Supreme Court, U.S.
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No.

In the Supreme Court of the United States

TOMMY G. THOMPSON,
SECRETARY OF HEALTH AND HUMAN SERVICES,
ET AL., PETITIONERS

v.

WESTERN STATES MEDICAL CENTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the Food and Drug Administration Modernization Act of 1997 (FDAMA), Congress enacted a limited exemption from the new drug approval (and certain other) requirements of the Federal Food, Drug, and Cosmetic Act, for drugs compounded by pharmacists. See 21 U.S.C. 353a. The question presented is whether FDAMA's limitation of that exemption to pharmacists who do not solicit prescriptions for or advertise specific compounded drugs is consistent with the First Amendment.

PARTIES TO THE PROCEEDINGS

Petitioners are Tommy G. Thompson, Secretary of Health and Human Services, and Bernard A. Schwetz, Acting Principal Deputy Commissioner, United States Food and Drug Administration. Respondents are Western States Medical Center, Women's International Pharmacy, Health Pharmacy, Apothecure, College Pharmacy, Lakeside Pharmacy, and Wedgewood Village Pharmacy.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of Health and Human Services and the Acting Principal Deputy Commissioner of the Food and Drug Administration, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 238 F.3d 1090. The opinion of the district court (App., *infra*, 16a-59a) is reported at 69 F. Supp. 2d 1288. An earlier opinion of the district court granting respondents' motion for a temporary restraining order (App., *infra*, 60a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 2001. A petition for rehearing was denied on April 27, 2001 (App., *infra*, 78a-79a). On July 15, 2001, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 25, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent provisions of the Food and Drug Administration Modernization Act of 1997, 21 U.S.C. 353a (Supp. V 1999), and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 301 *et seq.* (1994 & Supp. V 1999), are reprinted in an appendix to this petition. App., *infra*, 80a-107a.

STATEMENT

1. a. The Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.* (1994 & Supp. V 1999), defines a "new drug" as "[a]ny drug * * * not generally recognized * * * as safe and effective for use under the conditions prescribed." 21 U.S.C. 321(p). The FDCA generally requires that, before a new drug may be introduced into interstate commerce, the manufacturer or distributor obtain the approval of the Food and Drug Administration (FDA). See 21 U.S.C. 355(a), 331(d). In order to obtain that approval, the manufacturer or distributor must demonstrate to the FDA's satisfaction that the drug is both safe and effective for each intended use. See 21 U.S.C. 355(b) (1994 & Supp. V 1999); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 613, 629, 632 (1973).

The FDCA also imposes standards for the manufacturing and labeling of drugs in order to ensure that manufacturing processes and drug ingredients are safe and effective and that consumers and physicians have adequate information about drug contents and effects. See 21 U.S.C. 351, 352 (1994 & Supp. V 1999). The FDCA prohibits the sale and distribution of "adulterated" or "misbranded" drugs. See 21 U.S.C. 331 (1994 & Supp. V 1999).

In addition, to facilitate regulatory oversight, the FDCA imposes registration, inspection, and reporting requirements on drug manufacturers. See 21 U.S.C. 360 (requiring domestic drug manufacturers to register with the Secretary); 21 U.S.C. 360(h) (requiring inspection of drug manufacturers at least once every two years); 21 U.S.C. 360(j) (requiring each registered drug manufacturer to "file with the Secretary a list of all drugs" that it manufactures for commercial distribution). The FDCA contains a limited exemption from its registration and some of its inspection requirements, however, for pharmacies that comply with state regulations and that do not "manufacture" or "compound" drugs other than in "the regular course of their business of dispensing or selling drugs * * * at retail." 21 U.S.C. 360(g)(1), 374(a)(2)(A).

b. Compounding is a process by which a pharmacist "combines, mixes, or alters ingredients to create a certain medication for a patient." *Professionals & Patients for Customized Care* v. *Shalala*, 847 F. Supp. 1359, 1361 (S.D. Tex. 1994), aff'd, 56 F.3d 592 (5th Cir. 1995). The process encompasses a range of pharmacy activities, including the modification of approved drugs "to provide medications that are not commercially

available, such as diluted dosages for children, or to alter the form of a medication for easier consumption." *Id.* at 1361.

When a pharmacy compounds a drug, the pharmacy creates a "new drug" because the compounded product is not generally recognized as safe and effective. See 21 U.S.C. 321(p). For that reason, interstate distribution of compounded drug products without compliance with the FDCA's approval requirements for new drugs was unlawful before enactment of the Food and Drug Administration Modernization Act of 1997 (FDAMA), Pub. L. No. 105-115, 111 Stat. 2296. See *Professionals & Patients*, 56 F.3d at 593 n.3; App., *infra*, 72a (1992 FDA Compliance Policy Guide). Nonetheless, the FDA recognized that compounding in response to a valid prescription in order to meet the medical needs of an individual patient for whom commercially available drugs are inadequate may serve an important public purpose for which the health benefits outweigh the risks. Therefore, "the FDA as a matter of policy [did] not historically [bring] enforcement actions against pharmacies engaged in traditional compounding." 56 F.3d at 593 n.3.

The FDA did take action, however, when compounding was outside the scope of normal pharmacy practice and compounded drugs were mass-produced and distributed in a manner tantamount to the manufacture of unapproved new drugs. See App., *infra*, 73a-74a. The FDA issued warning letters, see *id.* at 73a, and sometimes brought judicial enforcement actions against pharmacies engaged in drug manufacturing under the guise of compounding. *E.g.*, *United States* v. *Sene X*, 479 F. Supp. 970, 978 (S.D. Fla. 1979), aff'd, [1982-1983 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 38,207 (11th Cir. Jan. 12, 1983); *Cedars North Towers*

Pharmacy, Inc. v. *United States*, [1978-1979 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) ¶ 38,200, at 38,828 (S.D. Fla. Aug. 28, 1978). Among the factors that the FDA considered in determining whether a pharmacy was manufacturing drugs rather than engaging in traditional compounding were whether the pharmacy was "[s]oliciting business (e.g., promoting, advertising, or using sales persons) to compound specific drug products, product classes, or therapeutic classes of drug products," or "[d]istributing inordinate amounts of compounded products out of state." App., *infra*, 76a-77a.

2. Congress addressed the compounding issue when it enacted FDAMA in 1997. The section of FDAMA at issue in this case, now codified at 21 U.S.C. 353a (Supp. V 1999), "bring[s] the legal status of compounding in line with FDA's longstanding enforcement policy of regulating only drug manufacturing, not ordinary pharmacy compounding." 143 Cong. Rec. S9839 (daily ed. Sept. 24, 1997) (Sen. Kennedy). Section 353a seeks to "ensure continued availability of compounded drug products as a component of individualized drug therapy, while limiting the scope of compounding so as to prevent manufacturing under the guise of compounding." H.R. Conf. Rep. No. 399, 105th Cong., 1st Sess. 94 (1997) (Conf. Rep.); accord S. Rep. No. 43, 105th Cong., 1st Sess. 67 (1997) (S. Rep.).

Rather than leaving to the enforcement discretion of the FDA the determination of when compounding should be restricted, Congress chose to delineate in the FDCA itself certain limited circumstances under which pharmacy compounding would be exempt from requirements that apply to drug manufacturers. If certain conditions are met, Section 353a thus exempts compounded drug products from the FDCA's provisions governing

good manufacturing practices, adequate directions for use, and new drug approval. Under those conditions, which echo the FDA's pre-1997 practices regarding compounding, (1) the compounding must be performed by a licensed pharmacist or physician in response to a valid prescription made by a licensed practitioner, see 21 U.S.C. 353a(a)(1) (Supp. V 1999); (2) the compounding must use only ingredients that comply with various quality-control standards, see 21 U.S.C. 353a(b)(1)(A) and (B) (Supp. V 1999); (3) the compounded product may not be a drug product identified by regulation as presenting difficulties for compounding that would adversely affect safety or efficacy, see 21 U.S.C. 353a(b)(3)(A) (Supp. V 1999); (4) the compounding may not produce a drug that has been withdrawn from the market for safety reasons, see 21 U.S.C. 353a(b)(1)(C) (Supp. V 1999); and (5) the pharmacist may not compound regularly or in inordinate amounts any drug products that are essentially copies of a commercially available drug product, see 21 U.S.C. 353a(b)(1)(D), 353a(b)(2) (Supp. V 1999). FDAMA also limits the total volume of compounded drug products that a pharmacy may distribute out of State. See 21 U.S.C. 353a(b)(3)(B) (Supp. V 1999).

In addition, FDAMA makes the availability of the exemption of compounded drugs from certain FDCA requirements contingent upon the pharmacy's compliance with limitations on advertising and promotion of compounded drug products. Section 353a(a) exempts pharmacy compounding from the new drug approval and other requirements only if the compounded drug is produced "based on the unsolicited receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified

patient." 21 U.S.C. 353a(a) (Supp. V 1999). Section 353a(c) further provides that a pharmacy is entitled to the exemption only if it "does not advertise or promote the compounding of any particular drug, class of drug, or type of drug." 21 U.S.C. 353a(c) (Supp. V 1999). The advertising limitation does not, however, prevent the pharmacy from advertising that it performs compounding services generally. 21 U.S.C. 353a(c) (Supp. V 1999).

3. In November 1998, shortly before the relevant provisions of FDAMA took effect, respondent pharmacies, which regularly compound drugs in significant quantities, commenced this suit in the United States District Court for the District of Nevada against the Secretary and the Commissioner of Food and Drugs. Respondents sought a declaratory judgment that Sections 353a(a) and (c) violate the First Amendment and an order enjoining enforcement of those provisions against them.

The district court initially granted respondents a temporary restraining order that enjoined the government from enforcing Section 353a(c). App., *infra*, 60a-70a. The parties subsequently filed cross-motions for summary judgment. The district court concluded that Sections 353a(a) and (c) violate the First Amendment, granted respondents' motion, denied the government's motion, and permanently enjoined the FDA from enforcing the solicitation and advertising restrictions in Sections 353a(a) and (c). App., *infra*, 16a-57a. The court further held that the restrictions are severable from the remainder of Section 353a. *Id.* at 58a-59a.

4. The United States Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. App., *infra*, 1a-16a.

a. Applying the four-part test enunciated in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980), for determining the constitutionality of restrictions on commercial speech, the court of appeals affirmed the district court's holding that Sections 353a(a) and (c) violate the First Amendment. App., *infra*, 4a-12a. Because the government did not contest that the advertising and solicitation limitations in Section 353a apply to lawful, non-misleading speech, the court of appeals began its analysis with the second element in the *Central Hudson* analysis—whether the governmental interests that underlie Section 353a's solicitation and advertising conditions are substantial. *Id.* at 5a.

The court of appeals recognized that the government has a substantial interest in "protecting the public health and safety" and in "preserving the integrity of the drug approval process." App., *infra*, 5a-6a. The court also recognized that "[t]he government's effort to balance competing goals can be a substantial interest." *Id.* at 6a. The court concluded, however, that the government had not demonstrated that "its interest in striking a balance between ensuring compounding availability and limiting widespread compounding is substantial." *Id.* at 7a. The court reached that conclusion because, in its view, "[t]here is insufficient evidence in the record to conclude that the government has a substantial interest in preventing widespread compounding." *Ibid.*

Turning to the third step in the *Central Hudson* analysis, the court further held that the solicitation and advertising limitations in Section 353a do not directly advance either of the asserted interests that the court did find to be substantial—protecting the public health and safety and preserving the integrity of the drug

approval process. App., *infra*, 7a-10a. The court reasoned that the government "has not offered evidence or arguments to explain sufficiently why such restrictions will reduce the type of consumption of compounded drugs that is harmful, and even admits that it has a substantial interest in ensuring the availability of compounded drugs." *Id.* at 7a-8a. The court also was of the view that, "[w]ithout the advertising restrictions, other safeguards exist to protect the public." *Id.* at 8a (citing 21 U.S.C. 353a(a) (Supp. V 1999) (requiring valid prescription for compounded drug products), 353a(b)(1) (Supp. V 1999) (limiting substances that pharmacists may use in compounded products), and 353a(b)(1)(D) (Supp. V 1999) (preventing pharmacists from regularly compounding drugs that are essentially copies of commercially available products)).

In addition, relying on *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995), and *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173 (1999), the court concluded that Section 353a "is so riddled with exceptions that it is unlikely that the speech restrictions would actually succeed in depressing the volume of compounded drugs." App., *infra*, 9a. The court observed that "pharmacists can advertise their compounding services and promote their skills at medical trade events so long as they do not promote the compounding of any *particular* drug," and that a pharmacist may call a physician and recommend a compounded drug if a patient comes in with a prescription for a commercial drug and provides information to the pharmacist that indicates that the patient might require a compounded product. *Ibid.* In addition, the court noted that FDAMA permits compounded drugs to constitute at least 5% of the total interstate distributions and 100% of the total intrastate distributions

by a particular pharmacy. *Ibid.* (citing 21 U.S.C. 353a(b)(3) (Supp. V 1999)).

The court next addressed the fourth *Central Hudson* factor and concluded that the advertising and solicitation restrictions "are more extensive than necessary to achieve the asserted government interest." App., *infra*, 10a. The court suggested that, instead of limiting advertising, the FDA could require disclaimers stating that the compounded drugs being advertised had not been subjected to the FDA's approval process. *Ibid.* The court also offered the alternative of requiring all compounded drugs, including those created on an individual basis as part of the traditional practice of pharmacy, to undergo the safety and effectiveness testing required for new drugs under the FDCA. *Ibid.* The court rejected the government's argument that those alternatives would not address the interest in drawing a workable distinction between traditional, patient-based compounding and manufacturing of new drugs, noting that it had already determined that the government's interest in balancing those competing goals is not substantial. *Id.* at 11a.

b. Although the court of appeals affirmed the district court's judgment insofar as it held that the solicitation and advertising provisions in Section 353a violate the First Amendment, the court, accepting the government's submission, reversed the district court's decision to sever those provisions from the rest of Section 353a. App., *infra*, 12a-15a. The court reasoned that "Congress intended to provide access to compounded drugs while preventing pharmacies from making an end run around the FDA's drug manufacturing requirements." *Id.* at 12a. Because "Congress meant to exempt compounding pharmacists from FDCA requirements only in return for a prohibition on

the promotion of specific compounded drugs," the court concluded that the solicitation and advertising restrictions could not be severed from the rest of Section 353a. *Id.* at 13a-14a. Accordingly, the court invalidated Section 353a in its entirety. *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

The Food and Drug Administration Modernization Act of 1997 (FDAMA), 21 U.S.C. 353a (Supp. V 1999), provides a limited exemption from the new drug approval and certain other requirements of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. 301 *et seq.*, for drugs compounded by pharmacists. The court of appeals has held unconstitutional under the First Amendment the solicitation and advertising limitations that Congress adopted as conditions on the availability of that new exemption. In striking down those carefully crafted provisions of the federal food and drug laws, the court unduly limited Congress's authority to regulate the interstate distribution of new drugs while at the same time accommodating individual needs for compounding of drugs, and thereby undermined the ability of the Food and Drug Administration (FDA) to preserve the regulatory framework for protecting the public health and safety. That mistaken "exercise of the grave power of annulling an Act of Congress" warrants this Court's review. See *United States* v. *Gainey*, 380 U.S. 63, 65 (1965).[1]

1. As both Congress and this Court have recognized, the widespread distribution of drugs that have not been

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[1] We agree with the court of appeals' conclusion (App., *infra*, 12a-15a) that, if the solicitation and advertising provisions in Sections 353a(a) and (c) are unconstitutional, they are not severable from the other provisions of Section 353a. We therefore do not seek review of that holding in this Court.

shown to be safe and effective poses substantial health risks. See *United States* v. *Rutherford*, 442 U.S. 544, 556-557 (1979); *Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 622 (1973). Congress enacted the FDCA to ensure that drugs are not introduced into interstate commerce unless they first have been determined to be safe and effective. Accordingly, at the heart of the FDCA is the requirement that the manufacturer or distributor of a new drug obtain approval for each of its intended uses from the FDA before distributing the drug in interstate commerce. See 21 U.S.C. 321(p), 331(d), 355(a). That requirement rests on two related premises: first, proof of safety and efficacy must be established by rigorous, scientifically valid studies rather than the clinical impressions of individual doctors, who cannot by themselves compile and master the necessary information; and, second, those who promote new drugs and realize profits from their distribution should bear the often substantial costs of the investigations necessary to establish safety and efficacy. See *Hynson, Westcott & Dunning*, 412 U.S. at 619, 629-630; *Warner-Lambert Co.* v. *Heckler*, 787 F.2d 147, 156 (3d Cir. 1986). The new drug approval requirements ensure that drug manufacturers have the incentive to undertake the studies necessary to demonstrate that the drugs they seek to market are in fact safe and effective. For these reasons, the new drug approval process is a critical component of the FDCA's regulatory framework for the protection of public health and safety.

Congress came to recognize, however, that compounding offers an important health benefit for individual patients who, for particularized medical reasons such as allergies, cannot use the versions of drugs that have been approved by the FDA and are commercially available. Because obtaining FDA approval is a costly process, requiring approval of all drug products compounded by pharmacies would, as a practical matter, eliminate the availability of compounded drugs for those individual patients who have no alternative treatment. See S. Rep. 67 (exemption from approval requirements needed to "ensure continued availability of compounded drug products as a component of individualized drug therapy"); Conf. Rep. 94 (same). Congress therefore enacted Section 353a, which provides an exemption from the new drug approval requirements for traditional pharmaceutical compounding.

At the same time, Congress understood that an unrestricted exemption for compounded drugs from the new drug approval requirements would seriously impair the integrity of the drug approval process. A pharmacy could mass produce a particular drug product, stimulate demand for the product through advertising, and thereby effectively manufacture and distribute the drug in interstate commerce without complying with the drug approval requirements, which are critical to protecting the public health and safety. See *FDA Reform Legislation: Hearings Before the Subcomm. on Health and the Env't of the House Comm. on Commerce*, 104th Cong., 2d Sess. 31, 125 (1996) (*Hearings*) (testimony of Hon. David A. Kessler, Commissioner, FDA); *id.* at 59 (FDA Analysis). Indeed, regulatory experience had shown that manufacturing under the guise of compounding was not a mere hypothetical threat, but an existing problem. See App., *infra*, 72a-74a; *Hearings* 120-121 (Kessler testimony).

Permitting manufacturing to occur under the guise of compounding would have serious consequences beyond the potential for drugs that are unsafe or ineffective to

enter the marketplace. It would strike at the core of the drug approval requirements, and thus at the core of the FDCA itself. If drug producers could mass produce drugs through a pharmacy engaged in widespread compounding, and thus bypass the approval process, manufacturers would have far less incentive to bear the cost of establishing that the drugs they seek to market are in fact safe and effective. See *Hearings* 31, 59.

Section 353a thus reflects a carefully balanced congressional effort to "ensure continued availability of compounded drug products as a component of individualized drug therapy, while limiting the scope of compounding so as to prevent manufacturing under the guise of compounding." Conf. Rep. 94; accord S. Rep. 67. Rather than rely (as it had in the past) on the FDA's exercise of enforcement discretion to strike that balance, Congress sought instead to "bring the *legal status* of compounding in line with FDA's longstanding enforcement policy." 143 Cong. Rec. at S9839 (Sen. Kennedy) (emphasis added); see S. Rep. 67 (FDAMA "establishes the parameters under which compounding is appropriate and lawful"). Building on the FDA's enforcement experience, Congress sought to draw a clear line to distinguish traditional, individualized compounding from compounding that is tantamount to manufacturing. See 143 Cong. Rec. at S9839 (Sen. Kennedy); *ibid.* (Sen. Hutchinson) (legislation "would exempt pharmacy compounding from several regulatory requirements but would not exempt drug manufacturing from the act's requirements").

As the FDA had previously determined based on its enforcement experience, see App., *infra*, 72a, 76a, Congress reasonably concluded that advertising of particular drug products is a business practice that distinguishes manufacturing from traditional pharmaceutical

compounding. Traditional compounding involves the provision of a service in response to a physician's prescription and an individual patient's special medical need. See 21 U.S.C. 360(g)(1), 374(a)(2); *Professionals & Patients*, 56 F.3d at 593; App., *infra*, 71a-72a. Drug manufacturing, in contrast, is the mass production of a drug product, typically for a substantial market. Promotion of the manufactured product to physicians or the public is thus a common feature of manufacturing, but not of traditional compounding on an individualized basis in response to the medical needs of particular patients. See *id.* at 72a. By confining the compounding exemption to pharmacies that do not engage in conduct that is characteristic of manufacturing, Congress ensured that "the exemption would not create a loophole that would allow unregulated drug manufacturing to occur under the guise of pharmacy compounding." 143 Cong. Rec. at S9839 (Sen. Kennedy).

Focusing on promotion of the compounded drug as a trigger for application of the regulatory approval process also reflects the important underlying premise of the FDCA that the public health is best served when those who develop and promote new drugs bear the cost of proving that those drugs are safe and effective. See *Hynson, Westcott & Dunning*, 412 U.S. at 619, 629-630. If compounders could actively promote their products through advertising without bearing those costs, they would enjoy an unfair advantage over traditional drug manufacturers, who must comply with the approval requirements. That unfair advantage would undermine the incentive of all drug manufacturers to comply with those requirements, which is the FDCA's central mechanism to ensure that drugs introduced into interstate commerce are safe and effective for their intended uses. Section 353a was drafted to accom-

modate these competing considerations while promoting the FDCA's overriding goal of protecting the public health and safety.

2. The court of appeals erred in striking down Congress' carefully crafted approach to compounding. The court's erroneous holding flowed from its threshold determination that one of the important interests asserted by the government is not substantial. As discussed above, in enacting Section 353a, Congress attempted to balance competing goals: (1) preserving the effectiveness and integrity of the new drug approval process and the protection of the general public that it provides, and (2) preserving the availability of compounded drugs for those individual patients who, for particularized medical reasons, cannot use commercially available products that have been approved by the FDA. The court of appeals erroneously failed to apprehend and refused to credit the substantiality of the government's interest in balancing those competing, but independently compelling, interests by carving out only a narrow exception to the drug approval process. That threshold error in turn led the court to the erroneous conclusion at step three of the *Central Hudson* analysis that Section 353a does not directly and materially advance the government's goals, and at step four of the *Central Hudson* analysis that Section 353a is not sufficiently tailored to achieve those goals.

a. The Ninth Circuit recognized that a "congressional policy of balancing [competing] interests [can be a] substantial government interest that satisfies *Central Hudson*." App., *infra*, 6a (quoting *United States* v. *Edge Broad. Co.*, 509 U.S. 418, 428 (1993)). The court of appeals nevertheless refused to credit the government's interest in preventing the widespread

distribution and sale of drugs that have not been proven safe and effective, on the one hand, and permitting the compounding of drugs in limited circumstances to address the particularized medical needs of individual patients, on the other. The court instead insisted on "convincing evidence" of "the health risks associated with large numbers of patients taking such [compounded] drugs." App., *infra*, 6a-7a. The evidentiary demand imposed by the court of appeals is misplaced, especially in this case. Even as a general matter, this Court has made clear that the government may "justify [advertising and solicitation] restrictions based solely on history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2422 (2001) (quoting *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citations and internal quotation marks omitted)). As explained more fully below, the government's position here is supported by all of these factors, including considerable regulatory experience and congressional analysis.

Furthermore, the court of appeals' evidentiary demand is particularly inappropriate in this case, because it is based on a rejection of the fundamental premises of the FDCA—that the widespread distribution of drugs that have not first been shown to be safe and effective poses substantial health risks, and that the FDCA's new drug approval requirements are a legitimate and effective means to address those risks. This Court itself has acknowledged the validity of those premises, see *Rutherford*, 442 U.S. at 556-557; *Hynson, Westcott & Dunning*, 412 U.S. at 619, 622, and the court of appeals had no basis to question them here. See also *Warner-Lambert Co.* v. *Heckler*, 787 F.2d 147, 156 (3d Cir. 1986). The Ninth Circuit's apparent insistence that the government introduce evidence in court to establish

the importance of the central purposes of the FDCA was wholly unwarranted.

The court's evidentiary demand appears to have stemmed from its misunderstanding of one of the basic governmental interests underlying Section 353a. That interest is not simply, as the court characterized it, in "preventing widespread compounding." App., *infra*, 7a. Rather, the government's interest is in preventing compounding that is tantamount to manufacturing, which would threaten the integrity of the statutory scheme for ensuring that drugs are found to be safe and effective before they are introduced into commerce. Congress reasonably concluded that, at some point, high-volume compounding of one particular drug product is not meaningfully different from manufacturing that product. See Conf. Rep. 94; S. Rep. 67. At that point, compounders, like ordinary manufacturers, must be required to comply with the FDCA's new drug approval requirements, or those requirements will be substantially undermined. See *Hearings* 35, 59. As the court of appeals itself acknowledged, the government has a substantial interest in preserving the integrity of the drug approval process. App., *infra*, 5a-6a.

Congress also recognized, however, that compounding can meet the particularized medical needs of individual patients who cannot use the versions of drugs that have been approved by the FDA and are commercially available. The court of appeals acknowledged that the government has a substantial interest in permitting limited compounding to meet that need. App., *infra*, 7a-8a. Congress was simply seeking to balance the interest in preserving the integrity of the new drug approval process with the interest in making compounded drug products available in limited circumstances for those patients. See Conf. Rep. 94; S. Rep.

67; 143 Cong. Rec. at S9839 (statements of Sens. Hutchinson and Kennedy). Preserving and advancing those two compelling but competing interests is itself a substantial government interest. See *Edge Broad. Co.*, 509 U.S. at 428 (balancing competing governmental concerns can be a substantial governmental interest for purposes of the *Central Hudson* test).

b. The court of appeals' misapprehension of the government's interests doomed from the outset its application of the third step in the *Central Hudson* analysis. The court of appeals concluded at that step that the government had failed to show that limiting the compounding exemption to pharmacies that do not promote particular compounded products directly and materially advances the government's interests. App., *infra*, 7a-10a. The court understood the government to be arguing that Section "353a's speech restrictions will keep the demand for particular compounded drugs artificially low, and thereby protect unwary consumers." *Id.* at 8a. That was not the goal of Congress in enacting FDAMA. As explained above, Congress concluded that the advertising of a particular compounded drug product to the public reasonably identifies the point at which the interest in preserving the integrity of the drug approval requirement outweighs the interest in protecting the availability of traditional pharmaceutical compounding in response to *individual* medical needs. That congressional determination reflects the fact that advertising and promotion of particular drug products are distinguishing characteristics of drug manufacturing but not traditional, individualized compounding by pharmacies. It is based upon the FDA's prior enforcement experience. And it conforms to the premise of the FDCA that those who promote new drugs in order to realize profits from their

distribution should bear the cost of proving that those drugs are safe and effective for their intended uses before they are marketed. Congress reasonably determined that, when demand is great enough to justify a pharmacy's decision to manufacture large quantities of a particular compounded product and to promote that product through advertising, the pharmacy, like other manufacturers, should be required to bear the costs of complying with the FDCA's approval requirements and demonstrating that the new drug is safe and effective for its intended uses.

The court of appeals also relied on its own assessment that other "safeguards exist to protect the public." App., *infra*, 8a. The provisions of FDAMA on which the court relied, however, confirm the court's misunderstanding of the governmental interests underlying Section 353a. For example, the court noted that, under FDAMA, "[n]o compounded drug may be dispensed without a valid prescription from a licensed physician." *Id.* at 8a-9a (citing 21 U.S.C. 355a(a) (Supp. V 1999)). That requirement alone, however, is insufficient to advance the government's interest in preserving the integrity and safeguarding function of the FDCA's drug approval process, which is based on Congress's judgment that the ultimate determination whether a new drug is safe and effective cannot be left to individual doctors (who cannot by themselves compile and master the necessary information) but instead must be made by the FDA. See *Hynson, Westcott & Dunning*, 412 U.S. at 619, 630; *Warner-Lambert Co.*, 787 F.2d at 156 ("Congress rejected the notion * * * that individual physicians should be left to decide whether particular drugs were effective.").

The court of appeals also observed that a "pharmacist cannot regularly compound drugs that are essentially

copies of a commercially available drug product." App., *infra*, 9a (citing 21 U.S.C. 353a(b)(1)(D) (Supp. V 1999)). Although that limitation furthers the government's interest in preventing pharmacies from manufacturing products that are already available without complying with the FDCA's provisions governing good manufacturing practices, it does not address the problem of the manufacture through widespread compounding of products that are *different* from those that are commercially available. It is the latter form of compounding to which Sections 353a(a) and (c) are addressed, by ensuring that entities that promote the distribution in interstate commerce of *new* drug products will comply with the new drug approval requirements.[2]

The Ninth Circuit also concluded that Section 353a fails the third *Central Hudson* inquiry because, in the court's view, it "is so riddled with exceptions that it is unlikely that the speech restrictions would actually succeed in depressing the volume of compounded drugs." App., *infra*, 9a. The court noted, for example, that Section 353a permits pharmacies to advertise their general compounding services (see 21 U.S.C. 353a(c) (Supp. V 1999)) and does not prevent pharmacies from dispensing significant quantities of drugs intrastate (see 21 U.S.C. 353a(b)(3) (Supp. V 1999)). Contrary to the court of appeals' view, however, those provisions do not

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[2] Nor do 21 U.S.C. 353a(b)(1)(A) and (B), which limit the substances that pharmacists may use in compounding, address the governmental interest in preventing manufacturing of new drugs under the guise of compounding. Those provisions require that the *ingredients* used in compounded products meet certain quality standards. They do not ensure the safety and effectiveness of the compounded drugs themselves, which are still unapproved new drugs, and they do not operate to prevent compounding activity that is on the scale and in the manner of manufacturing.

impede the accomplishment of Section 353a's purpose of preventing manufacturing under the guise of compounding.

If compounders could actively promote particular compounded drug products without complying with the drug approval requirements, they would enjoy an unfair advantage over traditional drug manufacturers, which would significantly reduce the incentives for manufacturers to expend the resources necessary to prove that their new drugs are safe and effective. Indeed, under such a regime, traditional drug manufacturers could establish their own compounding entities and circumvent the approval process. Advertising that a pharmacy provides general compounding services, however, does not suggest the existence, or foster the growth, of a market for any *particular* compounded drug, and therefore does not significantly distort the incentives of drug manufacturers to comply with the new drug approval requirements. Permitting pharmacies to advertise that they provide compounding services generally thus is consistent with Congress's purpose of ensuring that particular drugs are widely distributed in commerce only after they have been proven to be safe and effective for their intended uses. At the same time, allowing a pharmacy to advertise its general compounding services furthers Congress's interest in preserving the availability of medically necessary treatments for individual patients when demand is insufficient to justify the costs of obtaining advance FDA approval. Section 353a thus does not at all permit "speech that poses the same risks the Government purports to fear." *Greater New Orleans Broad.*, 527 U.S. at 195.

Section 353a(b)(3) likewise does not frustrate the accomplishment of the purposes served by the limitations

on solicitations and advertising. Section 353a(b)(3) provides that a pharmacy may avail itself of the compounding exemption only if it is located in a State that has entered into an agreement with the Secretary that addresses the interstate distribution of inordinate amounts of compounded drugs, or if the pharmacy's total interstate distribution of compounded drug products does not exceed five percent of the total of its prescription orders. See 21 U.S.C. 353a(b)(3) (Supp. V 1999). That provision imposes a restraint in addition to and different in purpose from the advertising and solicitation conditions on the availability of the exemption. The advertising and solicitation limitations prevent the manufacture and marketing of *particular* drug products under the guise of compounding. Section 353a(b)(3) limits the volume of the pharmacy's *overall* interstate sales of compounded drugs in order to ensure that the pharmacy retains its character as a pharmacy rather than a drug manufacturer engaged in interstate commerce. The volume limitation in Section 353a(b)(3) applies only to interstate distributions, so that the States may continue to play their traditional role in regulating pharmacy practice. See 143 Cong. Rec. S12242 (daily ed. Nov. 5, 1997) (Sen. Jeffords) (Congress intended "to establish a rational framework for pharmacy compounding [that] respects the State regulation of pharmacy while allowing an appropriate role for the FDA."). The absence of volume limitations on overall intrastate distributions does not, however, detract from the importance of the advertising and solicitation limitations, which prevent the manufacture of particular drugs under the guise of compounding.

c. Finally, the Ninth Circuit's failure to appreciate the nature of the government's interests also led to its erroneous conclusion that Sections 353a(a) and (c) are

not sufficiently tailored to satisfy the fourth step of the *Central Hudson* inquiry. As this Court has recently reiterated, "'the least restrictive means' is not the standard; instead, the case law requires a reasonable 'fit between the legislature's ends and the means chosen to accomplish those ends.'" *Lorillard Tobacco Co.*, 121 S. Ct. at 2422 (quoting *Went For It, Inc.*, 515 U.S. at 632 (quoting in turn *Board of Trustees* v. *Fox*, 492 U.S. 469, 480 (1989))).

The court of appeals incorrectly concluded that "clear alternatives exist that can advance the government's asserted interest in a manner far less intrusive to the pharmacists' free speech rights." App., *infra*, 10a. On the contrary, the alternatives suggested by the court—requiring "disclaimers on compounded drugs explaining that they had not been subject to FDA approval," or subjecting all compounded drug products to the FDCA's new drug approval requirements, *ibid.*—would not only fail to advance, but would substantially hinder, the accomplishment of the purposes of Sections 353a(a) and (c).

Reliance on disclaimers is fundamentally inconsistent with the purposes of the FDCA's approval requirements. Congress has determined that public health and safety are best protected by requiring manufacturers to demonstrate to the FDA that their drugs are safe and effective for their intended uses *before* they are distributed widely in commerce. See *Hynson, Westcott & Dunning*, 412 U.S. at 619, 630. Disclaimers would not accomplish that purpose.

The other alternative suggested by the court of appeals—subjecting all compounded drugs to the new drug approval process—would be directly contrary to Congress's purpose of making compounded drugs available in the limited and individualized circumstances in which a specific patient cannot use the commercially available version of the drug. The court of appeals thus erred in concluding that Section 353a is not narrowly tailored to achieve the government's substantial interest in balancing the availability of compounding in response to the particular medical needs of individual patients with preventing manufacturing under the guise of compounding, which would threaten the integrity of the drug approval requirements.

3. The court of appeals has held an Act of Congress unconstitutional. That action alone warrants this Court's review. See *Gainey*, 380 U.S. at 65. The solicitation and advertising limitations in Sections 353a(a) and (c) were enacted by Congress as essential conditions on the availability of the exemption from the FDCA's new drug approval and other requirements. The court of appeals invalidated those limitations based on its misconception of the statutory provisions involved and its mistaken view of the First Amendment's application in the critical context of protecting the public health and safety. As we have explained above, the court of appeals' decision upsets the careful balance that Congress struck in Section 353a in specifying the point at which drug products should be subject to the FDCA's generally applicable new drug approval requirements. Those requirements are the linchpin of the Nation's laws regulating the manufacturing and distribution of drugs, and thus a central component of Congress's efforts in the FDCA to protect the public health and safety.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17424

WESTERN STATES MEDICAL CENTER, A NEVADA CORPORATION; WOMEN'S INTERNATIONAL PHARMACY, A WISCONSIN CORPORATION; HEALTH PHARMACY, A WISCONSIN CORPORATION; APOTHECURE, A TEXAS CORPORATION; COLLEGE PHARMACY, A COLORADO CORPORATION; LAKESIDE PHARMACY, A TENNESSEE CORPORATION; WEDGEWOOD VILLAGE PHARMACY, A NEW JERSEY CORPORATION, PLAINTIFFS-APPELLEES

v.

DONNA E. SHALALA, IN HER OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JANE E. HENNEY, M.D., IN HER OFFICIAL CAPACITY AS COMMISSIONER, DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the District of Nevada
David A. Ezra, District Judge, Presiding
D.C. No. CV-98-01650-DAE(RLH)

Argued and Submitted: Dec. 12, 2000
Filed: Feb. 6, 2001

Before: SCHROEDER, Chief Judge, HALL, and W. FLETCHER, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge.

This appeal requires us to assess the constitutionality of two subsections of the Food and Drug Administration Modernization Act of 1997 ("FDAMA"), 21 U.S.C. § 353a. Subsections §§ 353a(a) and (c) of FDAMA prohibit drug providers from promoting or advertising particular compounded drugs. In return, the providers are exempted from the standard drug approval requirements imposed by the Food and Drug Administration. Plaintiffs seek to enjoin the enforcement of these subsections, contending that they violate the First Amendment's guarantee of free speech. The district court agreed with Plaintiffs and granted their motion for summary judgment in a published opinion. *See Western States Medical Ctr.* v. *Shalala*, 69 F. Supp. 2d 1288 (D. Nev. 1999). The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1361. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

I

Plaintiffs are a group of licensed pharmacies. They have prepared written promotional materials that they distribute by mail and at medical conferences to inform patients and physicians of the uses and effectiveness of specific compounded drugs. "Compounding" is a process in which a pharmacist mixes ingredients to create a medication for an individual patient. Compounding is typically used to prepare medications that are not commercially available, such as a medication for a patient

who is allergic to an ingredient in a mass-produced product. Pharmacists can provide compounded drugs to individual patients only upon receipt of a valid prescription. *See* 21 U.S.C. § 353a(a).

The Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301-397, regulates drug manufacturing, marketing, and distribution. It invests the Food and Drug Administration ("FDA") with enforcement powers to make sure that the regulations are followed. In 1997, Congress amended the FDCA to exempt compounding from certain requirements of the FDCA, but only if the compounding pharmacies followed several conditions, including refraining from promoting particular compounded drugs. The new legislation sets out several restrictions on compounding including prohibitions on advertisements, like those of the Plaintiffs, that promote particular compounded drugs. *See* 21 U.S.C. §§ 353a(a) and (c).[3] Pharmacists

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[3] The statutes provide:

> [Some FDCA requirements do not] apply to a drug product if the drug product is compounded for an identified individual patient based on the unsolicited receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient . . . .

21 U.S.C. § 353a(a).

> A drug may be compounded under subsection (a) of this section only if the pharmacy, licensed pharmacist, or licensed physician does not advertise or promote the compounding of any particular drug, class of drug, or type of drug. The pharmacy, licensed pharmacist, or licensed physician may advertise and promote the compounding service provided by the licensed pharmacist or licensed physician.

21 U.S.C. § 353a(c).

may, however, inform the public that they offer general compounding services. *See* 21 U.S.C. § 353a(c).

Plaintiffs challenged FDAMA's advertising and solicitation restrictions in district court. They contended that the restrictions violate the Free Speech Clause of the First Amendment. In a well-reasoned opinion, the district court granted Plaintiff's motion for summary judgment, holding that the restrictions do not meet the test for acceptable government regulation of commercial speech set forth in *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980). The district court also held that the unconstitutional provisions were severable from the rest of FDAMA. This Court reviews the district court's grant of summary judgment de novo. *See Gutowsky* v. *County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997). "The evidence must be viewed in the light most favorable to the nonmoving party to determine whether there are any genuine issues of material fact for trial, and whether the district court correctly applied the relevant substantive law." *Federal Deposit Ins. Corp.* v. *O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992).

II

In *Central Hudson*, the Supreme Court set out a four-part test for determining the constitutionality of a government restriction on commercial speech. The court must determine whether: 1) the regulated speech is misleading or concerns unlawful activity; 2) the government has asserted a "substantial" interest in restricting the speech; 3) the government has demonstrated that the regulation "directly advances" the asserted interest; and 4) the restriction is not more

extensive than necessary to achieve the asserted governmental interest. *See Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343. Although the government has asserted substantial interests, they have failed to demonstrate that the speech restrictions directly advance those interests or that they are narrowly tailored to those interests.

A

The First Amendment does not protect commercial speech that is "inherently misleading" or concerns unlawful activity. *See id.* at 563-64, 100 S. Ct. 2343. On appeal, the government does not contend that the prohibited speech is unlawful or misleading, and there is no indication in the record that Plaintiffs' advertisements are untruthful. Therefore, the restricted speech must be evaluated according to the other three *Central Hudson* factors.

B

Under the second part of the *Central Hudson* test, the speech restriction must serve a "substantial" government interest. In the district court, the government argued that the challenged restrictions served three substantial interests: 1) protecting the public health and safety; 2) preserving the integrity of the drug approval process; and 3) balancing the need to preserve drug compounding for individual patients with particularized needs while preventing widespread distribution of compounded drugs. The district court determined that the first two interests were substantial and satisfied the second prong of the *Central Hudson* test. Because "the Government has a significant interest in protecting the health, safety, and welfare of its

citizens," we agree that the first two interests are substantial. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 485, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

The third asserted interest was "insufficiently clear" to the district court. *Western States*, 69 F. Supp. 2d at 1303. The court reasoned that for an interest in balancing competing goals to be substantial, the goals themselves must be substantial. *See id.* at 1302. The court agreed that the goal of ensuring the continued availability of compounded drugs to individual patients was a substantial concern, but was not convinced that the government had a substantial interest in preventing widespread compounding. It held that if the government could not offer an adequate rationale for its goal of preventing widespread distribution of compounded drugs, then the government did not have a substantial interest in balancing this concern with the need for continued access to such drugs. *See id.* at 1302-03.

The government's effort to balance competing goals can be a substantial interest worthy of government protection. *See United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) (holding that the "congressional policy of balancing the interests of lottery and non-lottery States is the substantial government interest that satisfies *Central Hudson*"). But the government must supply a compelling argument or convincing evidence that it has a substantial interest in achieving both goals. The government cannot carry its burden by "mere speculation or conjecture." *Edenfield* v. *Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993); *cf. Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (crediting the state's interest

as substantial on the basis of a two-year study containing statistical and anecdotal evidence).

We agree with the district court that the government has not met its burden. There is insufficient evidence in the record to conclude that the government has a substantial interest in preventing widespread compounding. The government asserts that increased distribution of compounded drugs is dangerous because of the health risks associated with large numbers of patients taking such drugs. The government neither explains nor supports this contention. In fact, most of the evidence runs to the contrary. Compounding is not only legal under state law, but most states require their pharmacists to know how to compound. *See* Sen. Rep. No. 105-43, at 64 (1997). The government has failed to show that its interest in striking a balance between ensuring compounding availability and limiting widespread compounding is substantial. The only substantial interests asserted by the government are protecting the public's health and preserving the integrity of the drug approval process.

C

Under the third *Central Hudson* factor, the speech regulation must "directly advance" the government interest. In essence, the government argues that the speech restrictions are necessary to prevent an increase in the demand for compounded drugs that would be injurious to the public health. But the government's argument falls short of what is required to show that the speech restrictions will protect the public. The government has not offered evidence or arguments to explain sufficiently why such restrictions will reduce the type of consumption of compounded drugs that is

harmful, and even admits that it has a substantial interest in ensuring the availability of compounded drugs.

The government bears the burden of showing that its regulation will advance its interest "to a material degree." *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 505, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). In *44 Liquormart*, the Supreme Court held that a state statute prohibiting advertisement of liquor prices violated the First Amendment. The Court agreed with the State that "common sense supports the conclusion that a prohibition against price advertising . . . will tend to mitigate competition and maintain prices at a higher level than would prevail in a completely free market." *Id.* at 505, 116 S. Ct. 1495. But the Court disagreed with the State's argument that the prohibition would advance the State's interest in promoting temperance and reducing demand "to a material degree." The Court explained that it required evidentiary support for such an argument, not mere speculation. *See id.* "Such speculation certainly does not suffice when the State takes aim at accurate commercial information for paternalistic ends." *Id.* at 507, 116 S. Ct. 1495. Similarly, the government in this case contends that § 353a's speech restrictions will keep the demand for particular compounded drugs artificially low, and thereby protect unwary consumers. The government offers no evidence demonstrating that its restrictions would succeed in striking the balance it claims is a substantial interest, or even would protect the public health.

Without the advertising restrictions, other safeguards exist to protect the public. No compounded drug may be dispensed without a valid prescription from a licensed physician to an individual patient. *See*

§ 353a(a). FDAMA sets out specific requirements for the substances that can be used by the pharmacist to fashion a compounded drug. *See* § 353a(b)(1). A pharmacist cannot regularly compound drugs that are essentially copies of a commercially available drug product. *See* § 353a(b)(1)(D).

In addition, FDAMA is so riddled with exceptions that it is unlikely that the speech restrictions would actually succeed in depressing the volume of compounded drugs. The exceptions also demonstrate that the restrictions do not directly advance the government's interest in maintaining the integrity of the drug approval process. Under the statute, pharmacists can advertise their compounding services and promote their skills at medical trade events so long as they do not promote the compounding of any *particular* drug. It seems obvious that advertising that informs physicians that a pharmacy is available to compound drugs is likely to increase demand for compounding. Moreover, even with the ban on specific advertising, FDAMA provides significant incentives for pharmacies to increase their drug compounding business. The statute allows compounded drugs to constitute up to five percent of a pharmacy's interstate drug distributions and 100 percent of its intrastate drug distributions. If a pharmacy has a Memorandum of Understanding with the Secretary of Health and Human Services, up to twenty percent of its interstate drug distributions can be in the form of compounded drugs. *See* § 353a(b)(3). Under FDAMA, a pharmacist can call a physician and recommend a drug compound when a patient comes in with a prescription for a commercial drug and provides information to the pharmacist that indicates that the patient might require a compounded product. When

exemptions and inconsistencies counteract the alleged purpose of a speech restriction, the restriction fails the direct advancement test. *See Greater New Orleans Broadcasting Ass'n* v. *U.S.*, 527 U.S. 173, 190, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999); *Rubin*, 514 U.S. at 488-89, 115 S. Ct. 1585 (1995).

D

Finally, the speech restrictions fail the fourth *Central Hudson* factor; they are more extensive than necessary to achieve the asserted government interest. If clear alternatives exist that can advance the government's asserted interest in a manner far less intrusive to the pharmacists' free speech rights, then the restrictions are invalid. *See Coors Brewing*, 514 U.S. at 490-91, 115 S. Ct. 1585; *Project 80's, Inc.* v. *City of Pocatello*, 942 F.2d 635, 637 (9th Cir. 1991). The district court proposed either disclaimers on compounded drugs explaining that they had not been subject to FDA approval or a full-blown safety review like that imposed on manufactured drugs as alternatives that would be far less intrusive to free speech. *See Western States*, 69 F. Supp. 2d at 1308-09. Disclaimers would satisfy the government's substantial interest in preventing consumers from being misled into taking unsafe drugs. Full-scale FDA review of compounded drugs would satisfy the government's interest in protecting the public health and serve as a much more precise way of preserving the integrity of the drug approval process. *See Project 80's*, 942 F.2d at 638 (stating that where there are "far less restrictive and more precise means" to achieve the desired end, the speech restriction is more extensive than necessary and fails the fourth *Central Hudson* factor.)

The government contends that the district court's suggested alternatives are useless since they do not address the government's substantial interest in balancing the availability of compounded drugs with the need to limit their widespread "manufacture." But the district court's alternatives are viable because the government's interest in balancing two competing goals failed to meet the second prong of *Central Hudson*. The alternatives do offer credible solutions for the government's substantial interests in safeguarding the public health and maintaining the integrity of the drug approval process.

Even if the district court had not proposed compelling alternatives and the government had marshaled sufficient evidence to show that compounded drugs are dangerous and their volume should be limited, prohibitions on truthful speech are still strongly disfavored. "We have never held that commercial speech may be suppressed in order to further the State's interest in discouraging purchases of the underlying product that is advertised." *Central Hudson*, 447 U.S. at 574, 100 S. Ct. 2343 (Blackmun, J., concurring). In *44 Liquormart*, the Court explained:

> Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from deception or overreaching, they usually rest solely on the offensive assumption that the public will respond "irrationally" to the truth. The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.

517 U.S. at 503, 116 S. Ct. 1495. Government prohibitions of truthful commercial messages are "particularly dangerous" and deserve "rigorous review." *Id.* at 501, 116 S. Ct. 1495. The government has failed to support adequately its assertion that lower demand for compounded drugs will protect the public. Workable alternatives to the speech restrictions exist. Therefore, FDAMA's speech restrictions are more extensive than necessary.

III

Sections 353a(a) and (c) cannot be severed from the rest of FDAMA unless Congress would have enacted the constitutional provisions of FDAMA absent the unconstitutional provisions. *See Alaska Airlines* v. *Brock*, 480 U.S. 678, 685, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); *Board of Natural Resources* v. *Brown*, 992 F.2d 937, 948 (9th Cir. 1993). A statute's unconstitutional provisions are not severable if the entire statute is designed to strike a balance between competing interests. *See United States* v. *Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998). FDAMA's legislative history demonstrates that Congress intended to provide access to compounded drugs while preventing pharmacies from making an end run around the FDA's drug manufacturing requirements.

The first legislative proposal to address pharmacy compounding appeared in the House of Representatives in 1996. That bill would have exempted pharmacy compounding from FDCA requirements without restrictions on advertising specific compounded products. *See* H.R. 3199, 104th Cong. § 18 (Apr. 30, 1996). FDA Commissioner David Kessler expressed concern with the bill's lack of safeguards, and the possibility of a massive

increase in the number of drugs available that did not meet FDA standards:

> The [bill] has no constraints on the volume of compounding. It is likely to encourage large-scale manufacturing under the guise of pharmacy compounding. It would allow bulk drug suppliers or drug manufacturers to circumvent the approval requirements of the Act by shipping bulk drug substances to pharmacies for reconstituting or other processing. A shadow industry of unapproved generic drugs is likely to develop. Moreover, the exemptions would allow potentially dangerous compounding.

FDA Reform Legislation: Hearings Before the Subcomm. on Health and Environ. of the House Comm. on Commerce, 104th Cong. 31, 125 (May 1 and 2, 1996) (statement of Hon. David A. Kessler).

Subsequent versions of the legislation responded to the FDA Commissioner's concerns. The new House bill provided that the compounded products would be exempt from FDCA requirements only if the compounding pharmacist "does no more than advertise or otherwise promote the compounding service and does not advertise or otherwise promote the compounding of a particular drug or device." H.R. 1411, 105th Cong. § 17 (Apr. 23, 1997). A similar Senate bill tied exemption from FDCA requirements to a prohibition on advertising particular compounded drugs. *See* S. 830, 105th Cong., § 809 (July 1, 1997).

Evidence in the legislative record interpreting the final legislation demonstrates that Congress meant to exempt compounding pharmacists from FDCA requirements only in return for a prohibition on the promotion

of specific compounded drugs. A House report explained that FDAMA was designed to "ensure continued availability of compounded drug products as a component of individualized drug therapy, while limiting the scope of compounding so as to prevent manufacturing under the guise of compounding." H.R. Conf. Rep. No. 105-399. Senator Kennedy noted that "some of [FDAMA's] conditions are intended to ensure that the volume of compounding does not approach that ordinarily associated with drug manufacturing." 143 Cong. Rec. S9840 (Daily ed. Sept. 24, 1997). The President's comments upon signing FDAMA into law reflect a concern with striking a balance between compounding and manufacturing: "The Act will also resolve the issue of pharmacy compounding-the process of making customized medicines-so that legitimate pharmacy compounding is allowed, while the manufacture of unapproved drugs is not." Statement on Signing the Food and Drug Administration Modernization Act of 1997, 33 Weekly Comp. Pres. Doc. 1885 (Nov. 21, 1997). Given these statements and the decision by both houses of Congress to add specific provisions to address the advertising or promotion of compounded products, we believe that Congress would not have passed FDAMA absent the restrictions on commercial speech.

The existence of a severability clause at § 1391 of the FDCA does not change our interpretation of the legislative history.[4] It is true that the presence of a

[4] The clause reads:

> If any provision of this Act is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the Act and the applicability thereof to other persons and circumstances shall not be affected thereby.

severability clause creates a presumption that Congress did not intend for the validity of a statute to depend on the survival of its constitutionally offensive provisions. *See Alaska Airlines* v. *Brock*, 480 U.S. 678, 686, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987). But that presumption is not conclusive. *See id.* Because Congress approved this severability clause *before* FDAMA's passage, it is less compelling evidence of legislative intent than a clause enacted simultaneously with FDAMA. Congress may have intended the original provisions of the FDCA to be severable, but meant for FDAMA's provisions to stand or fall together. Given the evidence in the legislative history of Congress's desire to facilitate drug compounding while not allowing for widespread creation of drugs that have not been FDA approved, the FDCA's severability clause is not persuasive.

IV

Thus, we hold that § 353a(a) and § 353a(c)'s restrictions on commercial speech violate the First Amendment. These provisions may not be severed from the rest of the provisions in § 353a. Accordingly, § 353a is invalid in its entirety.

AFFIRMED IN PART, REVERSED IN PART.

21 U.S.C. § 391.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

No. CV-S-98-01650(DAE)(RLH)

WESTERN STATES MEDICAL CENTER, A NEVADA CORPORATION; WOMEN'S INTERNATIONAL PHARMACY, A WISCONSIN CORPORATION; HEALTH PHARMACY, A WISCONSIN CORPORATION; APOTHECURE, A TEXAS CORPORATION; COLLEGE PHARMACY, A COLORADO CORPORATION; LAKESIDE PHARMACY, A TENNESSEE CORPORATION; WEDGEWOOD VILLAGE PHARMACY, A NEW JERSEY CORPORATION, PLAINTIFFS

v.

DONNA E. SHALALA, IN HER OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JANE E. HENNEY, M.D., IN HER OFFICIAL CAPACITY AS COMMISSIONER, DEFENDANTS

Filed: Sept. 16, 1999

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

DAVID ALAN EZRA, Chief Judge.

The court heard the parties' motions on June 22, 1999. Michael A. Reiter, Esq., and Howard M. Hoffman, Esq., appeared at the hearing on behalf of

Plaintiffs; Gerald C. Kell, Esq., Patricia J. Kaeding, Esq., and Blaine T. Welsh, Esq., appeared at the hearing on behalf of Defendants. After reviewing the Motions and the supporting and opposing memoranda, the court DENIES Defendants' Motion for Summary Judgment and GRANTS Plaintiffs' Cross-Motion for Summary Judgment.

I. *BACKGROUND*

This case involves a First Amendment challenge to Section 503A of the Food and Drug Modernization Act of 1997 (the "Modernization Act"), codified at 21 U.S.C. § 353a ("§ 353a"). The Modernization Act exempts "compounded drugs" from the standard drug approval requirements imposed by the Food and Drug Administration ("FDA"). However, §§ 353a(a) and (c) condition this exemption on drug providers agreeing to not promote or advertise particular compounded drugs. Plaintiffs are licensed pharmacists seeking to enjoin the enforcement of these subsections of § 353a, contending that they violate the First Amendment's guarantee of free speech.[5]

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[5] Plaintiffs' challenge here is focused on §§ 353a(a) and (c), which, taken together, restrict the advertisement or promotion of compounded drugs as well as the solicitation of business associated with their production. However, in their Complaint, Plaintiffs also challenge § 353a(b)(3), which limits the distribution of compounded drugs to no more than five percent of the total prescription orders dispensed outside the state, unless a Memorandum of Understanding ("MOU") is developed between a state and the Secretary of Health and Human Services which "addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounding drug products distributed outside such States . . . ." In such a case, up to 20% of pharmacists' total

A. *Factual Background*

Compounding is the process by which a pharmacist combines, mixes or alters ingredients to create a medication that serves the unique needs of specific patients. Pharmacists may provide compounded drugs to individual patients upon receipt of a valid prescription. Such drugs are produced for a variety of reasons, such as when the patient is allergic to an ingredient in the product or when the product is not available in the proper dosage. It is a process that is taught as part of the standard curriculum at most pharmacy schools, and most states have laws requiring that pharmacists have sufficient education and equipment to provide some compounding services.

Plaintiffs are eight licensed pharmacies located in seven states. In addition to providing traditional pharmaceutical services, they regularly compound drugs in order to meet the specific needs of individual patients. To accomplish this task, Plaintiffs maintain that they have each pursued individual specializations in the compounding of certain drugs. As a result, compounded drugs represent between 60% and 90% of Plaintiffs' total drug orders.

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orders distributed in interstate commerce may constitute compounded drugs. To this date, the Secretary has not developed an MOU with any state. Moreover, the Secretary issued a "Guidance for Industry on Enforcement Policy during Implementation for Section 503A for the Federal Food, Drug and Cosmetic Act," which states that the FDA will exercise its discretion to not enforce § [353a(b)(3)] "[until] at least 90 days after the standard MOU is finalized and made available to the States for their consideration and signature." Because the FDA has agreed not to enforce this Section, Plaintiffs are not currently seeking injunctive relief with respect to § 353a(b)(3).

According to Plaintiffs, they have traditionally advertised their compounding services in order to both promote their products and inform physicians and patients of the variety of available compounded drugs. Plaintiffs explain that the compounding process requires them to consult with physicians and patients, and in some cases, make recommendations about the proper combination of drugs. Accordingly, they have prepared written promotional materials that they distribute both by mail and at medical conferences, and they often include studies and other research to inform consumers and physicians of the uses and effectiveness of specific compounded drugs.

B. *Statutory History and Framework*

The Federal Food, Drug and Cosmetic Act (the "FDC Act"), 21 U.S.C. § 355(a), imposes stringent conditions on the manufacture and distribution of new drugs.[6] The FDC Act imposes numerous requirements on the approval of new drugs, and provides that "[n]o person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application . . . is effective with respect to such drug." § 355(a). All new drugs must comply with these requirements unless Congress has provided an explicit exemption.

Historically, while the FDA has subjected new drugs to its requirements, it has permitted pharmacists to

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[6] "New drug" is defined as "any drug . . . generally recognized . . . as safe and effective for use under the conditions prescribed. . . ." 21 U.S.C. § 321(p). To obtain FDA approval of a new drug, the manufacturer must demonstrate to the FDA that the drug is safe and effective for each of its purported uses. 21 U.S.C. § 355(b).

compound drugs without meeting these stringent safety standards. In accordance with this policy, prior to the enactment of the Modernization Act in 1997, the FDA had never exercised its authority to subject compounded drugs to the FDC Act's requirements. However, the FDA had expressed concern over efforts by pharmacists and other drug providers to manufacture drugs under the guise of compounding. In 1992, the FDA issued a Compliance Policy Guide ("CPG") that reflected the FDA's policy regarding efforts to manufacture drugs without obtaining FDA approval. The CPG set forth nine factors the FDA used to determine whether a drug provider's efforts to produce a particular drug justified the FDA's exercise of enforcement action under the FDC Act. These factors included "[s]oliciting business (e.g., promoting, advertising, or using sales persons) to compound specific drug products, product classes, or therapeutic classes of drug products," and "[d]istributing inordinate amounts of compounded products out of state." CPG at 153-54, attached as Exhibit A to Defendants' Motion for Summary Judgment. The CPG explained that such actions were more consistent with manufacturing than compounding, and enforcement of FDA regulations was thus necessary to prevent the "very real potential for causing harm to the public health when drug products are manufactured and distributed in commercial amounts without FDA's approval." CPG at 152.

In 1997, Congress formally recognized this policy by enacting the Modernization Act of 1997. Under the Modernization Act, pharmacists are free to produce compounded drugs without meeting the FDA's restrictive regulations, as long as they satisfy several conditions. First, under subsection (a), the drug product

must be compounded "for an identified individual patient based on the unsolicited receipt of a valid prescription order." Subsection (b) imposes numerous standards on the quality of the ingredients of the compounded drug, requiring, *inter alia*, that the drug product be compounded from a list of approved drug substances that have not been deemed unsafe or inappropriate for compounding. Finally, under subsection (c), a drug may be compounded "only if the pharmacy, licensed pharmacist or licensed physician does not advertise or promote the compounding of any particular drug, class of drug, or type of drug."

On November 19, 1998, Plaintiffs filed their Complaint and Motion for Temporary Restraining Order, seeking injunctive and declaratory relief. They contended that because §§ 353a(a) and (c) allow pharmacists to compound drugs only if they forego the advertising and promotion of their products, these subsections represent an unconstitutional condition in violation of the free speech clause of the First Amendment. On November 20, 1998, Plaintiffs filed a Motion for Temporary Restraining Order and Preliminary Injunction, requesting that the court enjoin the enforcement of the speech-related restrictions in §§ 353a(a) and (c). On December 18, 1998, after an evidentiary hearing held on December 4, 1998, the court granted Plaintiffs' Motion in part and temporarily restrained the Government from enforcing § 353a ("TRO Order"). The parties stipulated to the extension of the TRO Order, pending resolution of the Summary Judgment Motions addressed here.

II. *STANDARD OF REVIEW*

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc.* v. *Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). The movant must be able to show "the absence of a material and triable issue of fact," *Richards* v. *Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the nonmoving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. 2548. *But cf., id.*, at 328, 106 S. Ct. 2548 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n* v. *Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial.

See T.W. Elec., 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd.* v. *Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S. Ct. 1790, 60 L. Ed. 2d 241 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *California Architectural Bldg. Products, Inc.* v. *Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), (citing *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)) (original emphasis).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg* v. *Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Eisenberg*, 815 F.2d at 1289.

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the nonmoving party. *Id.* These inferences may be drawn both from underlying facts that are not in dispute, as well as from

disputed facts which the judge is required to resolve in favor of the nonmoving party. *Id.*

III. *DISCUSSION*

In their Complaint, Plaintiffs argue that the restrictions on advertising and promoting compounded drugs contained in subsections (a) and (c) of the Modernization Act violate Plaintiffs' First Amendment rights to free speech. They challenge these sections on two bases: 1) they are unconstitutional on their face; and 2) they are unconstitutional as applied to Plaintiffs.

Defendants advance two arguments in support of the instant Motion for Summary Judgment. First, they contend that Plaintiffs lack standing to bring their "as-applied" challenge to § 353a, as they have not demonstrated that it either has been or will be applied to them. Second, they argue that § 353a is a valid limitation on Plaintiffs' free speech rights, and therefore, does not violate the First Amendment. The court begins with the preliminary issue of standing, and then turns to the constitutionality of § 353a.

A. *Standing*

A plaintiff may challenge a regulation, ordinance or other government action on the grounds that it is unconstitutional on its face or unconstitutional as it applies to the plaintiff. *Bd. of Trustees of the State Univ. of New York*, 492 U.S. 469, 482, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *Gaudiya Vaishnava Society* v. *City of Monterey*, 7 F. Supp. 2d 1034, 1041 (N.D. Cal. 1998). An ordinance will be deemed facially unconstitutional in either of two cases: "[E]ither . . . it is unconstitutional in every conceivable application, or . . . it seeks to prohibit such a broad range of

protected conduct that it is unconstitutionally overbroad." *Members of City Council* v. *Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) ("*Vincent*"). Where a regulation implicates only commercial speech, however, parties may generally not lodge a facial challenge to a regulation of commercial speech on overbreadth grounds. *See Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Washington Mercantile Ass'n* v. *Williams*, 733 F.2d 687, 689 (9th Cir. 1984). Therefore, Plaintiffs' facial challenge must be made on the ground that § 353a is unconstitutional in "every conceivable application."

Plaintiffs may also challenge the constitutionality of a statute as it applies to them. "An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others." *Foti* v. *City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). "A determination that an ordinance's application is unconstitutional as applied to a particular plaintiff does not necessarily render the ordinance invalid, it only invalidates the particular application of the ordinance." *Gaudiya Vaishnava Society* v. *City of Monterey*, [7 F. Supp. 2d at] 1041 (N.D. Cal. 1998).

Whether a party asserts a facial or as-applied challenge, Article III of the United States Constitution requires that there be an actual case or controversy before the court. *See Flast* v. *Cohen*, 392 U.S. 83, 94-101, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). To satisfy the case or controversy requirement, plaintiffs must demonstrate that they have suffered an actual or threatened injury as a result of the challenged conduct and that the injury will be redressed by a favorable

decision. *See Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982). A party who fails to meet this requirement lacks standing to bring its claims. *See Secretary of State of Maryland* v. *Munson*, 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

In this case, Plaintiffs advance a "pre-enforcement" challenge to § 353a, explaining that they intend to engage in conduct that will put them within the statute's reach and § 353a thus poses a threat of injury. Defendants do not contest Plaintiffs' right to bring a *facial* pre-enforcement challenge. Defendants argue, however, that Plaintiffs may not assert an as-applied challenge because the statute has not actually been applied to them. Thus, at bottom, Defendants contend that facial pre-enforcement challenges and as-applied pre-enforcement challenges are subject to different standing requirements.

Courts discussing standing to bring "pre-enforcement" challenges have not typically differentiated between as-applied and facial challenges. Rather, they have concluded generally that standing to bring a pre-enforcement challenge exists when the "plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979); *see also Doucette* v. *City of Santa Monica*, 955 F. Supp. 1192 (C.D. Cal. 1997).

The Ninth Circuit has explained that unless a plaintiff lodges an overbreadth attack, which permits the plaintiff to assert the interests of third parties, the

plaintiff must meet traditional standing requirements. *N.A.A.C.P., Western Region* v. *City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984). In *N.A.A.C.P.*, the court explicitly held that facial challenges alleging overbreadth allow "courts to ignore the prudential rule that a litigant has standing to vindicate only his own constitutional rights," because such a challenge asserts that the statute "will chill the protected speech of third parties." *Id.* at 1352. In contrast, the court explained that a "quite different" type of facial challenge is one that seeks relief on the ground that the statute is unconstitutional because it "restricts protected activity in every conceivable application." *Id., quoting Munson*, 467 U.S. at 964, 104 S. Ct. 2839. In the latter case, "[b]ecause the plaintiff asserts his own injury as the basis for judicial relief . . . the court can entertain his claim without departing from traditional standing concerns." *Id.* Thus, under *N.A.A.C.P.*, a facial challenge attacking a statute in "every conceivable application" is subject to the same traditional standing requirements applied to as-applied challenges.

In both their facial and their as-applied challenge, then, in order to establish standing, Plaintiffs must allege first that they have "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute," and second, that "there exists a credible threat of prosecution." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979). Because Plaintiffs have so alleged, as Defendants do not dispute, they are entitled to challenge § 353a both facially and as applied to them. *See also Foti*, 146 F.3d at 635 (concluding that "[i]nadequate evidence of the

City's alleged discriminatory enforcement of the ordinance does not defeat their as-applied challenge").

While Plaintiffs do have standing to bring either type of challenge to § 353a, however, there is no substantive distinction in this case between Plaintiffs' two challenges, as Plaintiffs have not identified any unusual application of § 353a to their specific circumstances. On the contrary, they appear to lodge a broad challenge to the constitutionality of the general application of § 353a:

> Plaintiffs, both in writing and orally, have advertised, promoted, and solicited their compounded drugs for a long time prior to the enactment of Section 353a. Plaintiffs intend and need to continue to advertise, promote and solicit compounded drugs. Moreover, while the FDA argues that it has not "applied or enforced [Section 353a] against plaintiffs or any other individual or group" . . ., the FDA has "not indicated that [it] will not enforce the advertisement ban found in [§ 353a]."

Thus, Plaintiffs simply present themselves as typical parties who may be harmed by the application of § 353a. Thus, Plaintiffs' as-applied challenge is subsumed by their facial challenge, and any conclusion by this court that § 353a is unconstitutional as applied to Plaintiffs would also entail the conclusion that § 353a is unconstitutional "in every conceivable application." *See also Gaudiya Vaishnava Society*, 7 F. Supp. 2d at 1043 n.6 (concluding that where the plaintiff "failed to offer any evidence that the . . . Ordinance is unconstitutional in the manner in which it was applied to [the plaintiff's] particular speech activity, a necessary element of an as-applied challenge," the court's conclusions with respect to the plaintiff's facial and as-applied challenges apply with equal force to both arguments).

B. *Constitutionality of § 353a*

Plaintiffs challenge two subsections of § 353a. The first of these is contained in 353a(a), which requires that a prescription for the particular compounded drug be unsolicited and that it be prepared for an identified patient. That section provides:

> Sections 351(A)(2)(B), 352(f)(1), and 355 of this title shall not apply to a drug product if the drug product is compounded for an identified individual patient based on the *unsolicited* receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient.

(emphasis added). Subsection (c) of § 353a imposes a similar condition on the exemption, prohibiting any advertising and promotion of particular compounded drugs:

> A drug may be compounded under subsection (a) of this section only if the pharmacy, licensed pharmacist, or licensed physician *does not advertise or promote the* compounding of any *particular drug, class of drug, or type of drug.* The pharmacy, licensed pharmacist, or licensed physician *may advertise and promote* the compounding *service* provided by the licensed pharmacist or licensed physician.

21 U.S.C. § 353a(c) (emphasis added). Taken together, subsections (a) and (c) of § 353a establish that pharmacists may compound drugs without being subject to the requirements of the Act, if 1) the compounded drug is prepared for an individual patient in response to an unsolicited prescription from a physician, and 2) the

pharmacist refrains from advertising or promoting the compounding of particular drugs.

Plaintiffs argue § 353a(a) and (c) impermissibly infringe on protected rights under the First Amendment. The parties agree that the speech implicated by these sections is limited to commercial speech, and the applicable test is therefore that set forth in *Central Hudson.* Such speech represents "expression related solely to the economic interests of the speaker and its audience," *see Central Hudson Gas & Electric Corp.* v. *Pub. Service Comm'n of New York*, 447 U.S. 557, 561, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980), and "does no more than propose a commercial transaction." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 752, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

It is well-settled that "[t]he First Amendment . . . protects commercial speech from unwarranted governmental regulation." *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328, 1330 (9th Cir.1997) (*citing Central Hudson*, 447 U.S. at 561-62, 100 S. Ct. 2343). However, "[i]f commercial speech only is threatened, the requirements of the First Amendment are less rigorous." *Washington Mercantile*, 733 F.2d at 689. "The law has developed to ensure that advertising provides consumers with accurate information about the availability of goods and services." *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 496, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). Consistent with this ideal, courts have encouraged and protected commercial speech, but have limited that protection to "the dissemination of truthful and nonmisleading commercial messages about lawful products and services." *Id.* (*citing* Kozinski & Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 Tex. L. Rev. 747 (1993)).

In *Central Hudson*, the Supreme Court articulated the applicable test to evaluate the constitutionality of government regulations limiting commercial speech. The four-part *Central Hudson* test reflects a "more relaxed inquiry" than that applied to restrictions of non-commercial speech. *Ass'n of Nat'l Advertisers, Inc.* v. *Lungren*, 44 F.3d 726, 728-29 (9th Cir. 1994). The test provides:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S. Ct. 2343. "Under this intermediate scrutiny, the asserted governmental interest must be 'substantial,' rather than 'compelling,' and the regulation adopted must 'directly advance' this interest, rather than be 'precisely drawn.'" *Lungren*, 44 F.3d at 729 (*citing Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343).

The Central Hudson test can be distilled into four discrete questions: 1) As a threshold matter, is the targeted speech constitutionally protected; 2) has the Government asserted a "substantial" governmental interest; 3) does the regulation "directly advance" the

asserted interest; and 4) is the restriction more extensive than necessary to achieve the asserted governmental interest. If factor (1) is answered in the affirmative, the court must proceed to an analysis of the three remaining factors to determine whether the statute is justified by the asserted governmental interest it purportedly serves.

1. *Is the Speech Targeted by § 353a Constitutionally Protected?*

The first factor of the *Central Hudson* test directs the court to analyze whether, as a threshold matter, the speech in question is protected by the First Amendment. Under *Central Hudson*, "for commercial speech to come within that provision, it must at least concern lawful activity and not be misleading." 447 U.S. at 566, 100 S. Ct. 2343.

In this case, Defendants do not argue that the restrictions at issue involve illegal activity; rather, they contend that the targeted speech is misleading and may be restricted on that basis. Courts have divided the "misleading" element of the *Central Hudson* test into two categories: "inherently" misleading and "potentially" misleading. If speech is "inherently" misleading, it may be restricted without reference to the remaining three *Central Hudson* factors. To evaluate whether speech is "inherently misleading," courts will consider whether the speech is "more likely to deceive the public than to inform it," *Central Hudson*, 447 U.S. at 563, 100 S. Ct. 2343; whether there are substantial "possibilities for deception," *Friedman*, 440 U.S. at 13, 99 S. Ct. 887; whether experience has shown that such advertising is subject to abuse, *In re R.M.J.*, 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); and whether the intended audience has the ability to

evaluate the claims made. *Id.* Because inherently misleading speech carries substantial social harms, and the state obviously has a compelling interest in preventing such harms, speech that is inherently misleading may be regulated on that basis alone. *See In re R.M.J.*, 455 U.S. at 203, 102 S. Ct. 929.

If speech is merely "potentially" misleading, however, it may not be proscribed under the commercial speech test without analysis under the remaining three factors. "If the protections afforded commercial speech are to retain their force we cannot allow rote invocation of the words potentially misleading to supplant [the government's burden]." *Ibanez* v. *Florida Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 146, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) (internal citations and quotation marks omitted). Where the speech may or may not be misleading in any given case, it is only "potentially" misleading, and may not be subject to a blanket prohibition. *Lungren*, 44 F.3d at 731-32. In such cases, courts should evaluate a speech restriction "focusing on its potential for deception in light of the lessons of experience and the nature of the target audience." *Id.* at 732.

Here, Defendants contend that the speech at issue is inherently misleading, and thus may be prohibited without regard to the remaining *Central Hudson* factors. In the alternative, they argue that the speech is at least potentially misleading, and that the Government is therefore allowed greater deference in its regulation.

Defendants first argue that "[b]y their very nature," advertisements for compounded drugs "make express and implicit statements" about the safety and effectiveness of such drugs. They further claim that

"[b]ecause compounded drugs have not been shown to be safe and effective under the Act's longstanding and universally recognized scientific standards, advertisements, promotions, and solicitations involving particular unapproved compounded drugs are inherently misleading because they suggest that these unapproved drugs have therapeutic value."

Two considerations counsel the court to conclude that the speech targeted by the restrictions at issue is not "inherently misleading." First, there is no evidence in this case that the prohibited statements contain any information that is actually false. On the contrary, Plaintiffs seek to provide truthful information about their compounding services, the various compounded drugs they produce, and in some cases, research materials on the safety and effectiveness of the particular compounded drug. There is no false information in any of Plaintiffs' promotions, a fact that Defendants do not dispute. Defendants' unsupported assertion that the public will be misled into believing, by implication alone, that compounded drugs have passed FDA tests and been approved, is insufficient to warrant the conclusion that the restricted speech is "inherently misleading."

Defendants' own statement illustrates that the speech at issue is not inherently misleading. Defendants assert that the targeted speech is inherently misleading "because they suggest that these unapproved drugs have therapeutic value." Yet Defendants themselves presumably believe that compounded drugs have therapeutic value in some cases; otherwise, they would prohibit the unapproved use of such drugs altogether. Thus, even if it is true, as Defendants argue, that the promotion of compounded drugs suggests that they

have therapeutic value, according to Defendants' own argument, this is frequently an accurate and truthful claim about the drug's benefits.

Defendants rely on *United States* v. *An Article . . . Acu-Dot*, 483 F. Supp. 1311, 1315 (N.D. Ohio 1980) for the proposition that advertisements of unapproved drugs, such as the compounded drugs at issue here, are inherently misleading because they falsely indicate that the drugs have obtained FDA approval and that the drugs are therefore safe and effective. Defendants' reliance on *Acu-Dot*, however, is misplaced. There, the defendants were manufacturers of a "small, pin-head sized magnet attached to the underside of a circular, adhesive patch," which was designed to work as a minor pain reliever. The defendants marketed the product as useful "[f]or temporary relief of occasional minor aches and pains of muscles and joints." 483 F. Supp. at 1312. The FDA brought suit against the defendants, claiming that the product had only a placebo effect, and therefore, the defendants' promotional statements about the product were misleading. The FDA relied on the testimony of several experts who testified that "the devices could not achieve the effect alleged by the labeling, other than through a placebo effect." 483 F. Supp. at 1313. The defendants apparently did not dispute that the drugs had only a placebo effect, but contended that the placebo effect was sufficient to warrant the defendants' claims regarding the drugs' health benefits.

The court disagreed. The court emphasized that the device itself could not provide the benefits claimed in the advertisement; all physical benefits enjoyed by its users stemmed from a mental response to using the device. The court concluded that "the device often can

achieve its claims of providing 'temporary relief of occasional minor aches and pains of muscles and joints'; but this effect is the result of nothing more than sophisticated marketing chicanery." 483 F. Supp. at 1314. On these facts, the court held that the marketer's claim that the device itself provided temporary relief of minor aches and pains was false, and thus also "misleading."

Here, there is neither evidence nor argument that Plaintiffs will attribute therapeutic benefits to their products that the products themselves are unable to provide. Defendants simply assert that their promotions "imply," by omitting certain facts, that compounded drugs have obtained FDA approval. This assertion, without more, is clearly inadequate to warrant the conclusion that the commercial speech targeted by § 353a is "inherently misleading."

A second consideration militating against the conclusion that the speech is inherently misleading is that to the extent the targeted speech may have the potential to mislead, that misleading element can be reduced or removed altogether by the use of a narrower restriction. Were the FDA attempting to prevent the public from being misled by the implication that compounded drugs had been approved by the FDA, it could simply require pharmacists to include a disclaimer on their advertisements indicating that FDA approval had not been obtained.[7]

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[7] A required disclaimer on each advertisement or solicitation indicating that the particular compounded drug has not been tested or approved by the FDA as safe and effective would satisfy this goal.

A plurality of the United States Supreme Court reached a similar conclusion in *Peel* v. *Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990). There, the Attorney Registration and Disciplinary Commission of Illinois brought disciplinary proceedings against the plaintiff under a rule prohibiting attorneys from representing themselves to the public as specialists. The plaintiff, an attorney, was licensed to practice law in Illinois and other states, and also had obtained a "Certificate in Civil Trial Advocacy" from the National Board of Trial Advocacy. In his letterhead, the plaintiff stated his name, which was followed by a notation that read "Certified Civil Trial Specialist By the [Board]," and another notation that read "Licensed: Illinois, Missouri, Arizona." The Commission asserted that by listing these pieces of information in this way, the plaintiff implied to the public that he was a certified legal specialist. The Illinois Supreme Court agreed, holding that the First Amendment did not protect the plaintiff's letterhead because the public could confuse the State and the Board as the sources of the plaintiff's certification and his license to practice.

The Supreme Court reversed. The Court explained that a state may prohibit inherently misleading speech entirely, but it cannot impose an absolute prohibition if the information may be presented in a non-misleading manner. The Court emphasized that "[t]he facts stated on petitioner's letterhead are true and verifiable," and that there was no contention that "any potential client or person was actually misled or deceived" by the restricted speech. The Court recommended that as an alternative to a broad prohibition, the defendants could require a disclaimer to ensure that complete infor-

mation about attorneys' qualifications was provided to the public. It could not, however, broadly proscribe truthful information whose negligible misleading content could be remedied by providing more information. *See also Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n.24, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) (noting that the state may regulate a commercial message so that it will "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"); *Nutritional Health Alliance* v. *Shalala*, 953 F. Supp. 526, 528 (S.D.N.Y. 1997) (concluding that health claims not approved by the FDA are not inherently misleading where "at least some can be presented in a non-misleading fashion").

In *Washington Legal Foundation* v. *Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998) ("*WLF*"), the court applied the same reasoning to a case involving FDA regulations. There, a public interest group sought to enjoin the enforcement of government restrictions regulating the promotion and advertisement of "off- label" uses for prescription drugs.[8] The FDA argued that statements promoting off-label uses not approved by the FDA are "inherently misleading."

The court rejected the FDA's argument, which it characterized as one claiming that "any and all scientific claims about the safety, effectiveness, contraindications, side effects, and the like regarding prescription drugs are presumptively untruthful or misleading until

[8] "Off-label" uses involve using an FDA-approved drug for uses that have themselves not been approved, such as treating a condition not indicated on the label or treating the indicated condition but varying other factors, such as the dosing regimen.

the FDA has had the opportunity to evaluate them." 13 F. Supp. 2d at 67. It stated that the FDA "exaggerate[d] its overall place in the universe" by arguing that promotion of off-label drugs was "untruthful or inherently misleading merely because the FDA ha[d] not yet had the opportunity to evaluate the claim." 13 F. Supp. 2d at 67. The court concluded that the targeted statements about off-label uses were not "inherently misleading," because "at least some can be presented in a non-misleading fashion." *Id.* (*quoting Nutritional Health Alliance* v. *Shalala*, 953 F. Supp. 526, 528 (S.D.N.Y. 1997)).

As indicated earlier, if the FDA believed that the targeted statements in this case were likely to mislead, it could simply require that pharmacists compounding drugs include disclaimers in their advertisements, clarifying that the compounded drug had not passed the FDA approval process required of new drugs. In doing so, any potential the targeted speech may have to mislead the public would be prevented, with no violence done to free speech. The availability of such a reasonable alternative restriction militates against the conclusion that the speech at issue is "inherently misleading."

The court therefore concludes that the speech at issue in this case is not inherently misleading, and thus may not be prohibited without reference to the remaining *Central Hudson* factors. The court recognizes, however, that the targeted promotional statements have the potential to mislead, because consumers may, under certain circumstances, believe that the drugs have survived the rigorous testing and labeling requirements imposed on new drugs. "[T]he government may have more leeway" in restricting commercial speech

when there is the potential to mislead on issues involving public health. *Pearson* v. *Shalala*, 164 F.3d 650, 659 (D.C. Cir. 1999). However, "it must still meet its burden of justifying a restriction on speech." *Id.* If there is any likelihood that "truthful and nonmisleading expression will be snared along with . . . deceptive commercial speech, the State must satisfy the remainder of the Central Hudson test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at 768-69. Thus, the court must proceed to an analysis of the remaining factors to evaluate the constitutionality of § 353a, cognizant of the fact that the speech targeted by the restrictions are "potentially misleading," and "focusing on its potential for deception in light of the lessons of experience and the nature of the target audience." *Lungren*, 44 F.3d at 732.

2. *Does the Government assert a Substantial Government Interest?*

In this case, Defendants allege that three substantial interests are served by § 353a. First, Defendants point to the general goal of protecting the public health and safety. Plaintiffs do not dispute, as they cannot, that this is a substantial government interest entitled to federal protection. The Supreme Court has clearly stated that "the Government has a significant interest in protecting the health, safety, and welfare of its citizens." *Rubin*, 514 U.S. at 485, 115 S. Ct. 1585. Thus, the court agrees with Defendants that its goal of serving the public health and safety meet the substantial government interest request.

Defendants also assert two more specific goals allegedly advanced by the statute. Defendants contend first that § 353a serves the goal of maintaining the

integrity of the drug approval process. The court agrees that this interest is substantial. Congress has declared that all new drugs must be tested and approved by the FDA. The purpose of this requirement is to ensure that new drugs introduced into the market meet basic standards of safety and effectiveness. The FDA's approval gives consumers important information to evaluate a particular drug, and the integrity of this process is clearly necessary to its effectiveness and reliability. *See also WLF*, 13 F. Supp. 2d at 71 (concluding that encouraging manufacturers of approved drugs to subject off-label uses to the drug approval process is a substantial governmental interest).

Finally, Defendants argue that they have a substantial interest in balancing "the continued availability of compounded drug products as a component of individualized drug therapy, while limiting the scope of compounding so as to prevent manufacturing under the guise of compounding." Defendants' Motion at 20. The Supreme Court has confirmed that the government's effort to balance competing goals may be a substantial interest worthy of governmental protection. *See United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 428, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993) ("Edge") (concluding that the "congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*"). However, a finding that Defendants' asserted interest in balancing its competing goals requires a finding by this court that the competing goals themselves are substantial.

With respect to the first of these competing goals, Plaintiffs themselves echo Defendants' claim that individual patients may benefit from the compounding

of particular drugs to accommodate unique needs, such as age differences, allergies or unusual dosages. The court therefore agrees that the government has a substantial interest in ensuring the continued availability of compounded drugs for use by individual patients.

The court is not convinced, however, that Defendants have a substantial interest in preventing "compounding under the guise of manufacturing." Defendants have offered no definition of either manufacturing or compounding, apparently because the Modernization Act itself offers no such definition. Thus, there is no coherent way for this court to determine whether Defendants have a substantial interest in encouraging one while limiting the other. In their argument, Defendants appear to equate high volume distribution with manufacturing and low volume distribution with compounding. In their Motion, they insist that they must "limit the volume of compounding because of the increased health risks associated with a large number of patients receiving drugs that are not subject to the same quality control standards that apply to ordinary manufactured drugs." Defendants' Motion at 21. This framework, however, obviously cannot support Defendants' asserted interest in preventing compounding allegedly done under the guise of manufacturing. First, it does nothing to clarify the difference between manufacturing and compounding. Furthermore, even were the distinction clear, this argument neither explains nor supports the contention that there are "increased health risks associated with a large number of patients" receiving compounded drugs, but that compounded drugs in small quantities produce an overall benefit to the public health.

If, on the other hand, Defendants believe that the relevant distinction is between those drugs that are FDA approved and those that are not, the court agrees that the FDA has a legitimate interest in preventing pharmacists from circumventing FDA requirements by changing the description of their products. To the extent this is the basis for Defendants' distinction, the court agrees that it is substantial. The problem with this argument is that without more, it ultimately reduces to equating manufacturing with approved drugs and compounding with unapproved drugs. At that point, any interest Defendants assert in making compounded drugs available to individual patients is no longer tenable. Therefore, on the facts before it, the court is unable to either identify or acknowledge the significance of the distinction between manufactured and compounded drugs.[9] For this reason, it cannot agree with Defendants that the Government has a

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[9] In reality, the practical difference in this case between Defendants' notion of manufacturing and compounding may actually be embodied by the precise issue the court must address in this order. Specifically, it appears that Defendants would label pharmacy-initiated drug combining as manufacturing, and patient- or physician-initiated drug combining as compounding. This frames the distinction by looking to whether the pharmacist or other drug producer advertised, promoted or otherwise initiated the sale and use of the particular drug product. Of course, to accept Defendants' distinction, and more importantly, to accept that Defendants have a substantial interest in preserving this distinction, is to agree that Defendants have a substantial interest in preventing pharmacists from advertising or promoting particular compounded drugs, because to allow such promotion would be to allow pharmacists to manufacture under the guise of compounding. This conclusion begs the question before the court, which is whether the speech restrictions contained in § 353a are legitimate.

substantial interest in achieving the imprecise and undefined balance it purportedly seeks here.

The court thus concludes that Defendants' asserted interests of protecting the public health and safety and preserving the integrity of the FDA approval process are substantial and worthy of protection under *Central Hudson*. However, Defendants third asserted interest of balancing the need for compounded drugs in individual cases against the goal of preventing manufacturing under the guise of compounding is insufficiently clear in this case to constitute a substantial governmental interest. For these reasons, whether § 353a withstands constitutional scrutiny turns on whether 1) it directly advances the government's goals of protecting the public health and welfare, and preserving the integrity of the FDA drug approval process, and 2) it is narrowly tailored to accomplish these goals.

3. *Does the Regulation "Directly Advance" the Governmental Interests Asserted?*

Under the third factor, the court examines whether the regulation at issue "directly advance[s] the state interest involved." *Central Hudson*, 100 S. Ct. at 2350. Under this test, "the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* Rather, to satisfy this requirement, "the government must demonstrate that 'its restrictions will in fact alleviate [the asserted harms] to a material degree.'" *Valley Broadcasting Co.* v. *United States*, 107 F.3d 1328, 1334 (9th Cir. 1997) (*quoting Edenfield* v. *Fane*, 507 U.S. 761, 769, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993)).

In *Edenfeld*, the Supreme Court clarified that once the first two factors have been satisfied, the Government carries the burden of demonstrating that the challenged regulation advances the Government's interest "in a direct and material way." 507 U.S. at 767, 113 S. Ct. 1792. That burden "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-771, 113 S. Ct. 1792.

To satisfy this burden, Defendants advance the following argument: "The advertising restrictions in subsections (a) and (c) 'are intended to ensure that the volume of compounding does not approach that ordinarily associated with drug manufacturing.'" Defendants' Motion at 22 (*quoting* 143 Cong. Rec. S9840 (statement of Senator Kennedy)). Thus, at bottom, Defendants assert that the speech-related restrictions in § 353a are necessary to limit the volume of compounded drugs, thereby ostensibly protecting the public against the purported health risks associated with compounded drugs.

Defendants' argument fails to draw the necessary connection between their asserted interests on the one hand, and restricting the volume of compounded drugs on the other. Defendants concede that all compounded drugs must be prescribed by a physician, and they even encourage the use of compounded drugs for individual patients when the drugs are requested by a physician or patient. Thus, Defendants freely admit that making compounded drugs available in some number represents an overall benefit to the public health. However, as soon as the sale of the drug is encouraged by the pharmacist, Defendants insist that it poses a danger to the public health that warrants restriction.

The D.C. Circuit rejected an argument similar to Defendants' in *Pearson* v. *Shalala*, 164 F.3d 650 (D.C. Cir. 1999). There, similar to the FDA's argument here, the FDA claimed that the public health would be advanced by prohibiting drug producers from making health claims about FDA-approved dietary supplements, where the health claims themselves had not been approved by the FDA. Rejecting the FDA's argument, the court stated:

> The government simply asserts its 'common sense judgment' that the health of consumers is advanced directly by barring any health claims not approved by the FDA. Because it is not claimed that the product is harmful, the government's underlying—if unarticulated—premise must be that consumers have a limited amount of either attention or dollars that could be devoted to pursuing health through nutrition, and therefore products that are not indisputably health enhancing should be discouraged as threatening to crowd out more worthy expenditures. We are rather dubious that this simplistic view of human nature or market behavior is sound, but, in any event, it surely cannot be said that this notion—which the government does not even dare openly to set forth—is a direct pursuit of consumer health; it would seem a rather indirect route, to say the least.

Similar to the defendants in *Pearson*, Defendants in this case have not claimed that compounded drugs, in and of themselves, are harmful. Quite the contrary, they assert a "substantial interest" in ensuring the availability of such drugs in limited quantities. Instead, Defendants assert that the *volume* of compounded

drugs must be controlled to protect the public safety, with no argument as to why compounded drugs in greater quantity pose a higher risk to public safety.[10] Apparently, Defendants believe that as the volume of compounded drugs increases, the balance shifts, so that the benefits of compounded drugs are outweighed by their costs. Defendants have produced no evidence that such a phenomenon is likely to occur.

The only argument put forth by Defendants that may support this implicit claim is their unsupported assertion that physicians and consumers are unable to evaluate the health claims about compounded drugs made by advertising pharmacists. Defendants concede that Plaintiffs regularly include research and studies in their promotional materials, but boldly insist nonetheless that "most practicing physicians do not have the time or the training to make independent assessments . . . and reach an independent, objective conclusion as to the benefits, risks, safety and effectiveness of a particular compounded drug that has not undergone the approval process."

Several courts have considered and flatly dismissed Defendants' argument, rejecting the "paternalistic" view that suppression of truthful speech is necessary to protect physicians and consumers from their own misuse of truthful information. In *WLF*, for example, the court faced the similar question of whether the state could prohibit pharmacists from promoting off-label uses of approved drugs. The court rejected the government's assertion that a prohibition was neces-

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[10] It must be kept in mind that all dispensing of compounded drugs must be under a valid prescription to an individual patient by a licensed physician.

sary to prevent the misuse of drugs by physicians. It reasoned that "despite the FDA's occasional statements in its briefs to the contrary, physicians are a highly educated, professionally-trained and sophisticated audience. In making prescribing decisions, doctors want (and need) to know first and foremost if the drug is the most safe and effective means to treat the conditions suffered by the patients." *WLF*, 13 F. Supp. 2d at 63. *See also 44 Liquormart*, 517 U.S. at 503, 116 S. Ct. 1495 (recognizing that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good").

Perhaps the most insightful rendering of this principle is that reflected in the Supreme Court's decision in *Virginia Bd. of Pharmacy*. There, the court struck down a Virginia statute prohibiting pharmacists from advertising their prices for prescription drugs. In reaching its conclusion, the court expressed its aversion to the use of suppression as a means to prevent "uninformed" individuals from misusing accurate information. The Court explained:

> There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. If they are truly open, nothing prevents a "professional" pharmacist from marketing his own assertedly superior product, and contrasting it with that of the low-cost, high-volume prescription drug retailer. But the choice among these alternative approaches is not

> ours to make or the Virginia General Assembly's. It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770, 96 S. Ct. 1817.

The court agrees that suppression of truthful and accurate information as a means to protect society from its own misuse is anathema to the principles of the First Amendment. Were the FDA concerned with serving public health by preventing the purported harms of compounded drugs, it could certainly find a more direct route to that end than traveling through the protected area of speech. There is no evidence on the record that reducing the volume of compounded drugs will serve public health, and even if such evidence existed, broad prohibitions on truthful and accurate speech is an illegitimate method of achieving this goal.

Nor does § 353a directly advance the goal of preserving the integrity of the FDA approval process. If the FDA were concerned with ensuring that drug producers not avoid FDA regulations, it could easily require that all drugs, including compounded drugs, obtain FDA approval before being introduced into the stream of commerce. This would certainly be a more "direct" route to maintaining the integrity of the approval process. In actuality, there appears to be no logical connection between the regulation of speech on the one hand and the preservation of the integrity of the FDA's drug approval process on the other. The remaining sections of § 353a, which regulate the ingredients that may be used and limit the total amount of compounded drugs that may be distributed, would seem to more directly achieve those goals.

Furthermore, even if § 353a did not suffer from these flaws, given the substantial exceptions to its application that dramatically limit its reach, this court cannot conclude that § 353a directly advances the FDA's asserted interests. Pharmacists are free to advertise compounded *services*, as long as they do not advertise "any particular drug, class of drug, or type of drug." Thus, a pharmacy may advertise its compounding experience, including promotional activities at educational, professional and trade meetings, likely increasing the overall volume of compounded drugs, as long as it does not promote the compounding of any particular drug or class of drugs.

Section 353a also does not prohibit consultations between the compounding pharmacist and patients or physicians. By its terms, § 353a specifically allows a compounded drug to be based on either an unsolicited prescription or "a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient." 21 U.S.C. § 353a(a). The provision permits a pharmacist to call a physician, after a patient has presented a prescription that indicates a compounded product may be desirable, to discuss the possibility of prescribing a compounded product. Thus, the statutory scheme essentially bars pharmacists from promoting particular drugs, but leaves them free to either advertise compounding services generally or initiate discussions with physicians or patients regarding particular compounded products needed by individual patients. It is difficult to see how the communication of the same information can both serve and undermine the public health, depending on which party initiates the contact or the method used to communicate it.

Finally, if Defendants are concerned with limiting the volume of compounded drugs, as they allege, § 353a(b)(3) would appear to undermine that goal, because it explicitly permits compounded drugs to constitute up to 5% of interstate drug distributions, and 100% of intrastate drug distributions. Moreover, if a pharmacist has a Memorandum of Understanding ("MOU") with the Secretary of Health and Human Services, it can distribute as much as 20% of its total interstate drug distributions in the form of compounded drugs. For a large pharmacy such as Payless or Walgreens, this would permit the distribution of compounded drugs in substantial numbers, amounting to sales in the millions of dollars.

In *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995), the court relied on similar considerations to strike down a federal restriction on alcohol advertising, reasoning that there was "little chance" the restriction could advance the government's asserted goal, where "other provisions of the same Act directly undermine[d] and counteract[ed] its effects." 514 U.S. at 489, 115 S. Ct. 1585. In the Supreme Court's recent decision in *Greater New Orleans Broadcasting Ass'n* v. *United States*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999), the Court reached the same conclusion. There, the Court struck down a federal ban on gambling advertising, in part, because its application was riddled with exceptions, making it ineffective in serving its purported purpose. The Court explained that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." 527 U.S. at ——, 119 S. Ct. at 1925. Similarly, in this case, Defendants' primary

purpose for § 353a—limiting the volume of compounded drugs in order to serve the public health—is undercut by the exceptions allowed in its own provisions. Under these circumstances, § 353a does not "directly advance" Defendants' asserted interests.

The court therefore finds that the speech-related restrictions contained in § 353a do not directly advance the Government's asserted interests, as required by the third *Central Hudson* factor. However, even were the court to conclude that the statute could satisfy this requirement, § 353a is also flawed because it fails the fourth factor of the *Central Hudson*, in that it is not narrowly tailored to achieve its stated purposes.

4. *Is the Speech Restriction more Extensive than Necessary to Serve the Interests that Support it?*

Under the fourth *Central Hudson* factor, the court must consider whether the restriction is "more extensive than is necessary to serve [the asserted state] interest." *Central Hudson*, 447 U.S. at 566, 100 S. Ct. 2343. "The fourth part of the test complements the direct-advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Greater New Orleans*, 527 U.S. at ——, 119 S. Ct. at 1932.

Nearly twenty years after *Central Hudson* was decided, in the face of a disagreement over the appropriate interpretation of the fourth *Central Hudson* factor, the Supreme Court revisited the issue in *Bd. of Trustees of the State Univ. of New York* v. *Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989). In *Fox*, the Court explained that contrary to the holdings of several circuits, the fourth factor does not require

that a restriction be "absolutely the least severe that will achieve the desired end." Rather, what is required is a

> 'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the ends served; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

Fox, 492 U.S. at 480, 109 S. Ct. 3028 (*quoting Posadas de Puerto Rico Assoc.* v. *Tourism Co. of Puerto Rico*, 478 U.S. 328, 341, 106 S. Ct. 2968, 92 L. Ed. 2d 266 (1986)). While giving more deference to the state, the *Fox* Court noted at the same time that restrictions previously struck down under the *Central Hudson* test were usually "substantially excessive, disregarding 'far less restrictive and more precise means.'" *Fox*, 492 U.S. at 479, 109 S. Ct. 3028.

The Ninth Circuit subsequently considered the implication of *Fox* in *Project 80's, Inc.* v. *City of Pocatello*, 942 F.2d 635, 637 (9th Cir. 1991). Interpreting the *Fox* Court's holding, the Ninth Circuit stated that in order to find a "reasonable fit" between the state regulation and its asserted interest, the court must conclude that the regulation is "narrowly tailored to serve substantial governmental interests." *Project 80's*, 942 F.2d at 637. The court reasoned:

> By pointing out the alternatives available to the cities to advance their interests, we do not impose a least restrictive means requirement. Rather, we conclude, as did the Supreme Court in Fox [*sic*],

> that restrictions which disregard far less restrictive and more precise means are not narrowly tailored.

942 F.2d at 638. Thus, where there are "far less restrictive and more precise means" that will achieve the desire end, the fourth factor under *Central Hudson* is not satisfied. *Id.*; *see also Cal-Almond, Inc.* v. *United States Dep't of Agriculture*, 14 F.3d 429, 440 (9th Cir. 1993) (striking down advertising regulations that were "more extensive than necessary to serve the interest" asserted).

Applying this test to the instant case, it is clear that § 353a is not "narrowly tailored." As previously noted, were the FDA merely concerned with protecting the public from being misled about whether a drug has been FDA approved, it could require disclaimers to prevent any potential for confusion. The disclaimers could specifically state that the compounded drugs being advertised had not been subjected to the FDA's drug approval process. Included in these disclaimers could be statements about the costs and benefits of compounded drugs. The FDA could even require pharmacists to indicate that compounded drugs are intended for the specific needs of individual patients that cannot be met with approved manufactured drug products.

In *Pearson*, the court held that the FDA was required to consider disclaimers as an alternative to an outright ban on advertising. The court reviewed several recent Supreme Court cases "repeatedly pointing to disclaimers as constitutionally preferable to outright suppression." 164 F.3d at 657; *see Peel*, 496 U.S. at 110, 110 S. Ct. 2281; *R.M.J.*, 455 U.S. at 206 n.20, 102 S. Ct. 929; *Shapero* v. *Kentucky Bar Ass'n.*, 486 U.S. 466, 478, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988). The court concluded that where a statute

prohibits "incomplete" advertising, "the preferred remedy is more disclosure, rather than less." *Id.*, (*citing Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)). Here, too, Defendants could require disclaimers as an alternative to their prohibition on advertising compounded drugs, which would clearly represent a far less restrictive means to accomplish the FDA's asserted goals.

Alternatively, if Defendants' intention is to protect the public health and welfare and to preserve the integrity of the FDA approval process, and they believe that compounded drugs threaten these concerns, they could subject compounded drugs to the safety testing imposed on new drugs. While this would of course represent a broader restriction on the production of compounded drugs, it would not threaten the free speech interests implicated by § 353a.

Courts have repeatedly held that where the benefits reaped by restrictions on speech could be obtained through nonspeech restrictions, speech restrictions should be viewed with great suspicion. *See, e.g.*, *Greater New Orleans*, 527 U.S. at ——-——, 119 S. Ct. at 1934-35 ("It is well settled that the First Amendment mandates closer scrutiny of government restrictions on speech than of its regulation of commerce alone"); *see also 44 Liquormart*, 517 U.S. at 500, 116 S. Ct. 1495 (recognizing that "special concerns arise from regulations that entirely suppress commercial speech in order to pursue a nonspeech-related policy"). In its recent decision in *Greater New Orleans*, the Court recognized the harms of restrictions that indiscriminately and unnecessarily capture innocent speech. The Court there held that the statute at issue was suspect because it "sacrifice[d] an intolerable amount of truthful speech

about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate." *Id.*

Thus, even were Defendants able to show that compounded drugs carry substantial health risks, and therefore that their volume should be limited, the proper remedy to such a problem is not broad prohibitions on truthful speech. The *Greater New Orleans* Court reminds us that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct." 527 U.S. at ——, 119 S. Ct. at 1934 (citation omitted). In this case, there is no question that Congress has the authority, indeed the responsibility, to regulate the availability of potentially dangerous drugs. Where such an end can be achieved without reliance on speech restrictions, however, Congress cannot, consistent with the First Amendment, use protected speech to accomplish its task. As the Court in *44 Liquormart* recognized, "[t]he First Amendment makes clear that the Constitution presumes that attempts to regulate speech are more dangerous than attempts to regulate conduct." 517 U.S. at 511, 116 S. Ct. 1495.

In sum, by enacting § 353a, Defendants have impermissibly infringed on protected speech to advance interests that can be served through far less restrictive means. While Defendants have identified substantial government interests they seek to serve, § 353a does not directly advance these interests and is clearly not narrowly tailored to accomplish its purported goals. While the Government is given more deference in its regulation of commercial speech, this deference does not override the protections of the First Amendment, which prevent the unnecessary prohibition of truthful

speech to achieve goals that may be served without implicating protected freedoms.

C. *Severability*

Having concluded that the speech-related portions of §§ 353a(a) and (c) are unconstitutional, the court must now turn to the question of whether these sections may be severed from § 353a. It is well-settled that "a court should refrain from invalidating more of the statute then is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987) (*quoting Regan* v. *Time, Inc.*, 468 U.S. 641, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984)). "Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid." *Regan*, 468 U.S. at 652, 104 S. Ct. 3262 (citations omitted).

Consistent with these principles, the Supreme Court has stated that if the constitutionally permissible portions of a statute are "fully operative as a law," the offending portions should be severed "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919, 931, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (*quoting Buckley* v. *Valeo*, 424 U.S. 1, 108, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). Thus, only if the remainder of the statute is unable to operate independently as law, or it is clear that Congress would not have enacted the statute but for the impermissible portions, may the court invalidate the entire statute.

In this case, there is no question that the offending portions of subsections (a) and (c) can be severed from the remainder of § 353a. First, while extracting the speech-related provisions will certainly reduce the reach of § 353a, this modification will not render the statute unable to operate as law. The remaining portions of § 353a substantially limit and regulate pharmacists' production and distribution of compounded drugs. Subsection (b), for example, contains numerous requirements relating to the quality of the drug's ingredients and their effectiveness in compounding. Section 353a(b)(1)(A) requires that compounded drugs consist of drugs found on a list of "bulk drug substances," as defined in the Code of Federal Regulations. Section 353a(b)(1)(C) prohibits compounding of any drug ingredients that have been deemed unsafe or ineffective. Section 353a(b)(1)(D) prevents an individual from compounding "inordinate amounts [of] any drug products that are essentially copies of a commercially available drug product." Finally, § 353a(b)(3) limits pharmacists' distribution of compounded drugs to no more than 5%, or in some cases up to 20%, of the pharmacists' total interstate distribution of prescription orders. These remaining sections clearly represent independent requirements for the production of compounded drugs, allowing § 353a to be "fully operative as a law" even in the absence of the offending speech-related sections.

Furthermore, Defendants have presented no evidence that Congress would not have enacted § 353a in the absence of these provisions. Defendants simply point out that the exemption for compounded drugs in § 353a, by its terms, applies only if "the drug meets the requirements of this section." Defendants' Reply at 19.

Defendants infer from this statement that Congress would not have exempted compounded drugs from the FDA's approval process in the absence of the speech-related sections.

The evidence, however, is to the contrary. As Defendants concede, prior to Congress' enactment of the Modernization Act, FDA testing and labeling requirements were not imposed on compounded drugs; the FDA exercised its enforcement discretion to permit pharmacists to compound drugs without meeting these stringent standards. It is difficult for this court to believe that after years of permitting pharmacists to compound drugs without satisfying the FDA's stringent standards, the Government would now enforce these standards in the context of compounding because one of its alleged protections—the restriction of advertising—is unavailable. There is no evidence on the record to support this assumption; indeed, the facts support the opposite conclusion. Therefore, the court finds that the speech-related portions of the § 353a are severable, leaving the remainder of the statute to operate as it was enacted.

CONCLUSION

For the foregoing reasons, the court DENIES Defendants' Motion for Summary Judgment and GRANTS Plaintiffs' Cross-Motion for Summary Judgment, and enjoins the FDA from enforcing the speech-related restrictions contained in §§ 353a(a) and (c).

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CV-S-98-01650-JBR (RLH)

WESTERN STATES MEDICAL CENTER PHARMACY, A NEVADA CORPORATION; WOMEN'S INTERNATIONAL PHARMACY, A WISCONSIN CORPORATION; HEALTH PHARMACY, A WISCONSIN CORPORATION; APOTHECURE, A TEXAS CORPORATION; COLLEGE PHARMACY, A COLORADO CORPORATION; LAKESIDE PHARMACY, A TENNESSEE CORPORATION; WEDGEWOOD VILLAGE PHARMACY, A NEW JERSEY CORPORATION, PLAINTIFFS

v.

DONNA E. SHALALA, IN HER OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND MICHAEL A. FRIEDMAN, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER, UNITED STATES FOOD AND DRUG ADMINISTRATION, DEFENDANTS

[Filed: Dec. 18, 1998]

ORDER

On November 19, 1998, Plaintiffs Western States Medical Center Pharmacy, Women's International Pharmacy, Health Pharmacy Apothecure, College Pharmacy, Lakeside Pharmacy, and Wedgewood Village Pharmacy (jointly referred to hereinafter as "Pharmacies") moved (#3) for a temporary restraining

order against Defendants Donna Shalala, Secretary of the United States Department of Health and Human Services and Michael A. Friedman, Acting Commissioner of the United States Food and Drug Administration (jointly referred to hereinafter as the "Government"). The Government opposed (#15) Pharmacies' motion for a temporary restraining order, to which the Pharmacies replied (#17).

In their motion, Pharmacies seek to prevent enforcement of two provisions of the Food and Drug Modernization Act of 1997 (the "Modernization Act," 21 U.S.C. § 353a). The Modernization Act allows a pharmacy to compound drugs, without meeting the approval requirements established for new drugs, under certain conditions. Pharmacies claim that 21 U.S.C. § 353A(c), which allows a pharmacy to compound drugs only if the pharmacy "does not advertise or promote the compounding of any particular drug, class of drug, or type of drug," is an abridgment of speech protected by the First Amendment. In their motion, Pharmacies further claim that 21 U.S.C. § 353a(b)(3) should also not be enforced. Section 353a(b)(3) allows a pharmacy to only distribute "compounded drug products out of the States in which they are compounded in quantities that do not exceed 5 percent of the total prescription orders dispensed. . . ." A pharmacy, however, would be allowed to distribute compounded drugs in greater quantity if the State where the drugs is compounded has entered into a memorandum of understanding ("MOU") with the Secretary of Health and Human Services that "addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounding drug

products distributed outside such States. . . ." The Secretary, however, has not yet developed an MOU. Pharmacies argue that the 5 percent limitation should not be enforced until the Secretary actually develops the MOU.

The Government argues the Pharmacies do not have standing to challenge the Modernization Act because the Pharmacies have not demonstrated a realistic danger that the Act will be enforced against them. The Government further argues that the Pharmacies' right to freedom of speech has not been abridged because the First Amendment does not protect advertisements of illegal practices. The Government explains that compounding is illegal unless exempted under the Modernization Act. In order for compounding drugs to be exempt under the Modernization Act, a pharmacy may not advertise the compounding of a particular drug. The Government also argues advertising the compounding of specific drugs. The ingredients used in the Pharmacies' compounded drugs are approved by the Food and Drug Administration (the "FDA"). The specific combinations, proportions, dosages or uses, however, may not have been reviewed by the FDA's approval process.

Section 355(a) of the Federal Food, Drug and Cosmetic Act (the "Food and Drug Act," 21 U.S.C. § 301 et seq.), provides that "No person shall introduce or deliver into interstate commerce any new drug, unless an approval of an application . . . is effective with respect to such drug." Section 321(p) of the Food and Drug Act defines a "new drug" as "any drug . . . not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe and effective for use under the condi-

tions prescribed, recommended, or suggested in the labeling thereof . . . or . . . [a]ny drug . . . which has become so recognized [as safe and effective] but which has not . . . been used to a material extent or for a material time under such conditions." Many of the compounded drugs produced by Pharmacies can properly be classified as new drugs under the Food and Drug Act.

Previously, the Secretary had discretion to make exception to the above requirement, or has not historically enforced these provisions as to compounded drugs. However, in 1997, Congress enacted the Food and Drug Modernization Act of 1997 (the "Modernization Act," 21 U.S.C. § 353a). Section 353a(a) of the Modernization Act provides that a compounded drug need not obtain an approval of an application normally required of a new drug "if the drug product is compounded for an identified individual patient based on the unsolicited receipt of a valid prescription order or notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient, if the drug meets the *requirements of this section* and if the compounding is by . . . a licensed pharmacist in a State licensed pharmacy." (Emphasis added). One of the requirements of this section, 21 U.S.C. § 353a(c) (hereinafter referred to as the "Non-Advertising Provision"), is that the pharmacy may not "advertise or promote the compounding of any particular drug" or promote the compounding service provided by the licensed pharmacist . . ."

STANDING

In *Bland* v. *Fessler*, 88 F.3d 729, 736-37 (9th Cir. 1996), the Ninth Circuit held that a telephone advertiser that used computers to make automated phone calls

had standing under the First Amendment to challenge the constitutionality of a State public utility code prohibiting the use of devices to make automated phone calls even though the State had never enforced the statute against anyone. The Ninth Circuit found that, "one does not have to await the consummation of threatened injury to obtain preventative relief . . . [i]f the injury is certainly impending . . ." *Id.* at 736. The court reasoned when the statute allegedly infringes on freedom of speech, the alleged danger is self-censorship because of fear of prosecution under the statute and is a harm that can be realized without actual prosecution. *Id.* at 737. The court also noted that the telephone advertiser would "face grave consequences for violations of the civil statute, including civil fines and private suits for damages" and that the "State had not suggested that the newly enacted statute would not be enforced." *Id.* at 736 n. 11, 737. The Ninth Circuit concluded that to have standing when challenging the constitutionality of the statute under the First Amendment, plaintiff need only show "an actual well-founded fear that the law will be enforced against them." *Id.* at 737.

In this case, the Government has not indicated that they will not enforce the advertisement ban found in the Modernization Act, and Pharmacies face the same self-censorship due to a fear of prosecution expressed in *Bland*. Additionally, Pharmacies face grave consequences from States for violations of the advertisements ban. States may impose civil fines or revoke Pharmacies' licenses for failure to comply with federal drug safety statutes. Pharmacies have standing under the First Amendment to challenge the Modernization Act's prohibition against advertising compounded

drugs because they face an actual well-founded fear that the Act's Non-Advertising Provision will be enforced against them.

The Government does not allege that advertising a particular compounded drug is inherently misleading. The Government does argue, however, that compounded drugs fall under the definition of "new drug" and cannot be introduced or delivered into interstate commerce without the approval of an application for such drug unless the compounded drug is exempted from the approval process under the Modernization Act. The Government further argues that in order for compounding drugs to be exempt under the Modernization Act, Pharmacies may not advertise the compounding of a particular drug. The Government concludes that because the distribution of compounded drugs by Pharmacies is illegal unless the Modernization exemption applies, the advertisement of a particular compounded drug is not protected by the First Amendment.

The Court agrees that compounded drugs fall under the definition of a "new drug." In *Weinberger* v. *Bentex Pharmaceuticals*, 412 U.S. 645, 652 (1973), the Supreme Court, construing 21 U.S.C. § 321(p), recognized that "whether a particular drug is a 'new drug,' depends in part on the expert knowledge and experience of scientists based on controlled clinical experimentation and backed by substantial support in scientific literature." In *United States* v. *Generix Drug Corporation*, 460 U.S. 453, 461 (1983), the Supreme Court held that all the ingredients of a drug, both active and inactive, are subject to the requirements of § 321(p). While Pharmacies point out that the compounded drugs they distribute are listed in authoritative literature, they also admit

that in many instances the specific drug formulas have been individualized for a specific patient. Pharmacies do not contend that these individualized formulas, or even all the actual formulas listed in the authoritative literature, have undergone the extensive controlled clinical testing necessary so that many of the compounded drugs, with all their ingredients as proportioned, no longer fall within the terms of § 201(p).

The Court also agrees that, prior to the enactment of the Modernization Act, compounding a drug, which could be considered a "new drug," may have been illegal and that the Government used its enforcement discretion to not prosecute such cases when the Government believed that pharmacists were not engaged in manufacturing. By passing the Modernization Act, Congress decided to exempt compounding, under certain conditions, from the normal approval requirements necessary for new drugs. One of those conditions may not be the prohibition of commercial speech unless the Government can assert a substantial reason for the prohibition and also show that the prohibition directly advances that interest. To hold otherwise, would make "commercial speech" unprotectable. The advertisement of any product or service, which is not itself protected by the Constitution, could be banned by the Government with impunity. For example, the Government could make the selling of all products and services illegal except in instances where the selling of the product or service is not advertised, thus eliminating all commercial speech. Once Congress decided to permit compounding, even under limited circumstances such as those found in the Modernization Act, Congress cannot thereafter limit the advertising of compounding without satisfying the remaining *Central Hudson* factors.

Pharmacies, however, also take an untenable position with regards to legality of compounding and its relationship to the prohibition of advertising. Pharmacies argue that since compounding itself is not illegal, prohibiting the advertising of this perfectly legal conduct cannot be justified. Such an argument totally eliminates the last three prongs of the *Central Hudson* test and is contrary to the body of Supreme Court precedent.

While Justice Stevens, who authored the court's opinion in *44 Liquormart* v. *Rhode Island*, 517 U.S. 484 (1996) without a clear majority, "indicated his view that all truthful and not misleading speech was protected by the First Amendment," he dutifully applied all four prongs of the *Central Hudson* test and found that Rhode Island's ban on alcohol price advertisements did not satisfy its third ('directly advances') prong nor its forth ('not more extensive') prong." *E.g.*, *Nordyke* v. *Santa Clara County*, 110 F.3d, 707, 712 (9th Cir. 1997). In concurring, Justice O'Connor, speaking for three other justices, also firmly supported "the *Central Hudson* test in all its four parts." *Id.* The entire *Central Hudson* framework is premised on the notion that advertising of legal activities can be regulated, or even banned, if the government has a substantial interest and the regulation is no more extensive than necessary.

Recently, the Supreme Court upheld an advertising ban even though the underlying activity ws legal. In *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), the Supreme Court upheld a Florida Bar rule that prohibited lawyers from using direct mail to solicit personal injury or wrongful death clients within thirty days of an accident even though the representation of

these clients was not only legal but necessary. The court upheld the ban because it found the Florida Bar's interest in protecting the privacy of potential clients was substantial, and the prohibition no more extensive than necessary. *Id.* at 625-34. If the Government can provide a substantial reason for its ban on adverting specific compounded drugs and show that the prohibition is not more extensive than necessary, the Modernization Act prohibition on advertising could also be upheld.

The Government has asserted a substantial reason for its ban on advertising of specific compounded drugs. The Government asserts that it is protecting the patients from untested and unproven medications. The Government alleges that before a drug is mass marketed, it has a substantial interest to ensure drug safety and effectiveness. The Supreme Court has continuously held that "the Government has a significant interest in protecting the health, safety, and welfare of its citizens. . . ." *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 485 (1995). This Court finds that the Government's asserted interest to protect the public health is substantial.

The Government, however, has not provide any evidence that the regulation on advertising found in the Modernization Act directly advances the governmental interest asserted, or that the regulation is not more extensive than is necessary to serve that interest. In *Liquormart* almost all the Justices agreed that the government bears the burden of showing that the ban on advertising is no more extensive than necessary. *See* 517 U.S. at 507, 516 (Stevens' Opinion); 517 U.S. at 532 (O'Connor concurrence).

As the Supreme Court has explained, in order for a speech restriction to pass muster under the final prong, there must be "a 'fit' between the legislature's ends and the means chosen to accomplish those ends, a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." *Florida Bar*, 515 U.S. at 632. In *Florida Bar*, the government fulfilled that obligation by completing a 2-year study of the effects of lawyer advertising on public opinion, conducting hearings, commissioning surveys, reviewing extensive public commentary, and then determining that several changes to its advertising rules were in order. 515 U.S. at 620. This Court does not mean to suggest, however, that the Government's evidence needs to be as extensive. *But see Nordyke*, 110 F.3d at 713 (indicating that to satisfy the fourth prong of *Central Hudson* the government possibly would have to provide a detailed study to substantiate the government's reason for restricting speech). The Court only finds that the Government has offered no evidence that would indicate a reasonable fit between the Government's stated interest and the adverting ban on specific compounded drugs.

Irreparable Harm

The Court must now decide whether Pharmacies have demonstrated the possibility of irreparable harm. In *Elrod* v *Burns*, 427 U.S. 347, 373 (1976), the Supreme Court held that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See also S.O.C.*,

Inc. v. *County of Clark*, 152 F.3d 1136, 1148 amended by 160 F.3d 541 (9th Cir. 1998); *Foti* v. *City of Menlo Park*, 146 F.3d 629, 643 (9th Cir. 1998). As the Pharmacies have demonstrated probable success on the merits on their claim that 21 U.S.C. § 353a(c) infringes on their First Amendment right of freedom of speech, they have also demonstrated the possibility of irreparable harm. Plaintiffs have therefore met the conditions necessary to secure a temporary restraining order. Accordingly,

IT IS **ORDERED** that Pharmacies' motion for a temporary restraining order (#3) is PARTIALLY GRANTED in that the Government is temporarily restrained from enforcing 21 U.S.C. § 353a(c).

DATED this 18th day of December 1998.

/s/ JOHNNIE B. RAWLINSON
JOHNNIE B. RAWLINSON
United States District Judge

APPENDIX D

Compliance Policy Guide 7132.16

Manufacture, Distribution, and Promotion of Adultered, Misbranded, or Unapproved New Drugs for Human Use by State-Licensed Pharmacies

BACKGROUND:

This compliance policy guide (CPG) reflects long-standing FDA policy that has been articulated in related CPGs, warning letters, and federal court decisions.

FDA recognizes that pharmacists traditionally have extemporaneously compounded and manipulated reasonable quantities of drugs upon receipt of a valid prescription for an individually identified patient from a licensed practitioner. This traditional activity is not the subject of this CPG. With respect to such activities, it is important to note that 21 U.S.C. 360(g)(1) exempts retail pharmacies from the registration requirements that include, among other things, a mandatory biennial FDA inspection. The exemption applies to "pharmacies" that operate in accordance with state law and dispense drugs "upon prescriptions of practitioners licensed to administer such drugs to patients under the care of such practitioners in the course of their professional practice, and which do not manufacture, prepare, propagate, compound, or process drugs or devices for sale other than in the regular course of their business of dispensing or selling drugs or devices at retail" (emphasis added). See also 21 U.S.C. Sections 374(a)(2) (exempting pharmacies that meet the foregoing criteria from certain inspection provisions) and

353(b)(2) (exempting drugs dispensed by filling a valid prescription from certain misbranding provisions).

It should be noted, however, that while retail pharmacies that meet the statutory criteria are exempted from certain requirements of the Federal Food, Drug, and Cosmetic Act (Act), they are not the subject of any general exemption from the new drug, adulteration, or misbranding provisions of the Act.

FDA believes that an increasing number of establishments with retail pharmacy licenses are engaged in manufacturing, distributing, and promoting unapproved new drugs for human use in a manner that is clearly outside the bounds of traditional pharmacy practice and that constitute violations of the Act. Some "pharmacies" that have sought to find shelter under and expand the scope of the exemptions identified above, have claimed that their manufacturing, distribution, and marketing practices are only retail dispensing; however, the practices of these entities are far more consistent with those of drug manufacturers and wholesalers than with retail pharmacies. The activities of the self-styled pharmacies are consistent with the activities of manufacturers in that they direct promotional activities at licensed practitioners and patients. The promotional activities include employing detail persons and hiring marketing consultants to promote the company's specialization of compounding specific products or therapeutic classes of drugs. The firms also receive and use in large quantity bulk drug substances to manufacture unapproved drug products and to manufacture drug products in large quantity, in advance of receiving a valid prescription for the products. Moreover, the firms serve physicians and

patients with whom they have no established individual or professional relationship.

When less significant violations of the Act related to a pharmacy have occurred, FDA has worked cooperatively with state regulatory agencies; generally, FDA will continue to defer such actions to state authorities. However, FDA regards the more extreme examples of the foregoing conduct as significant violations that constitute deliberate efforts to circumvent the new drug, adulteration or misbranding provisions of the Act.

There is a very real potential for causing harm to the public health when drug products are manufactured and distributed in commercial amounts without FDA's prior approval and without adequate record keeping (to retrace and recall harmful products), without labeling, or without adequate manufacturing controls to assure the safety, purity, potency, quality, and identity of the drug product. In one recent instance, an outbreak of eye infections in regional hospitals, and the loss of an eye by each of two patients, was attributed to a drug product compounded by a pharmacy.

FDA has issued warning letters to several firms that were clearly manufacturing drugs for human use under the guise of traditional pharmacy practice. For example, one establishment manufactured over 300,000 dosage units of albuterol sulfate and other inhalation therapy drugs per month for 6,000 patients, most of whom live out of state. Another firm manufactured a large quantity of a drug product at dosage levels that have not been determined by adequate and well controlled studies to be effective for the indicated use. A recent inspection of another company operating with a pharmacy license revealed that the firm had hundreds of bulk drug ingredients on hand to manufacture about

165 different products. A review of the manufacturing dates of the "compounded" drugs on hand during the inspection of this firm revealed that 37 products had been produced over a year prior to the inspection, six products had been made between six and eleven months prior to the inspection, and 111 products had no recorded manufacturing date.

The agency has initiated enforcement action when pharmacy practice extends beyond the reasonable and traditional practice of retail pharmacy. The courts have upheld FDA's interpretation in those cases. See *United States* v. *Sene X Eleemosynary Corp.*, 479 F. Supp. 970 (S.D. Fla. 1979), aff'd. [1982-1983 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) para. 38,207 at 39,117 (11th Cir. 1983); *Cedars N. Towers Pharmacy, Inc.*, v. *United States*, [1978-79 Transfer Binder] Food Drug Cosm. L. Rep. (CCH) para. 38,200 at 38,826 (S.D. Fla. Aug. 28, 1978). *See also United States* v. *Algon Chemical, Inc.*, 879 F.2d 1154 (3d Cir. 1989), *United States* v. *9/1 Kg. Containers*, 854 F.2d 173 (7th Cir. 1988), cert denied. 489 U.S. 1010 (1989), and *United States* v. *Rutherford*, 442 U.S. 544 (1979), regarding limitations on sale of unapproved and otherwise unlawful products to licensed practitioners.

POLICY:

FDA recognizes that a licensed pharmacist may compound drugs extemporaneously after receipt of a valid prescription for an individual patient (i.e., an oral or written order of a practitioner licensed by state law to administer or order the administration of the drug to an individual patient identified and treated by the practitioner in the course of his or her professional practice). Pharmacies that do not otherwise engage in practices that extend beyond the limits set forth in this CPG may

prepare drugs in very limited quantities before receiving a valid prescription, provided they can document a history of receiving valid prescriptions that have been generated solely within an established professional practitioner-patient-pharmacy relationship, and provided further that they maintain the prescription on file for all such products dispensed at the pharmacy as required by state law.

If a pharmacy compounds finished drugs from bulk active ingredient materials considered to be unapproved new drug substances, as defined in 21 CFR 310.3(g), such activity must be covered by an FDA-sanctioned investigational new drug application (IND) that is in effect in accordance with 21 U.S.C. Section 355(i) and 21 CFR 312.

In certain circumstances, it may be appropriate for a pharmacist to compound a small quantity of a drug that is only slightly different than an FDA-approved drug that is commercially available. In these circumstances, patient-by-patient consultation between physician and pharmacist must result in documentation that substantiates the medical need for the particular variation of the compound.

Pharmacies may not, without losing their status as retail entities, compound, provide, and dispense drugs to third parties for resale to individual patients.

FDA will generally continue to defer to state and local officials regulation of the day-to-day practice of retail pharmacy and related activities. FDA anticipates that cooperative efforts between the states and the agency will result in coordinated investigations, referrals, and follow-up actions by the states.

FDA may, in the exercise of its enforcement discretion, initiate federal enforcement actions against entities and responsible persons when the scope and nature of a pharmacy's activity raises the kinds of concerns normally associated with a manufacturer and that results in significant violations of the new drug, adulteration, or misbranding provisions of the Act. In determining whether to initiate such an action, the agency will consider whether the pharmacy engages in any of the following acts:

1. Soliciting business (e.g., promoting, advertising, or using sales persons) to compound specific drug products, product classes, or therapeutic classes of drug products.
2. Compounding, regularly, or in inordinate amounts, drug products that are commercially available in the marketplace and that are essentially generic copies of commercially available, FDA-approved drug products.
3. Receiving, storing, or using drug substances without first obtaining written assurance from the supplier that each lot of the drug substance has been made in an FDA approved facility.
4. Receiving, storing, or using drug components not guaranteed or otherwise determined to meet official compendia requirements.
5. Using commercial scale manufacturing or testing equipment for compounding drug products.
6. Compounding inordinate amounts of drugs in anticipation of receiving prescriptions in relation to the amounts of drugs compounded after receiving valid prescriptions.

7. Offering compounded drug products at wholesale to other state licensed persons or commercial entities for resale.
8. Distributing inordinate amounts of compounded products out of state.
9. Failing to operate in conformance with applicable state law regulating the practice of pharmacy.

The foregoing list of factors is not intended to be exhaustive and other factors may be appropriate for consideration in a particular case.

FDA guidelines and other CPGs interpret or clarify agency positions concerning nuclear pharmacy, hospital pharmacy, shared service operations, mail order pharmacy, and the manipulation of approved drug products.

REGULATORY ACTION GUIDANCE:

Pharmacies engaged in promotion and other activities analogous to manufacturing and distributing drugs for human use are subject to the same provisions of the Act as manufacturers. District offices are encouraged to consult with state regulatory authorities to assure coherent application of this CPG to establishments which are operating outside of the traditional practice of pharmacy.

FDA-initiated regulatory action may include issuing a warning letter, seizure, injunction, and/or prosecution. Charges may include, but need not be limited to, violations of 21 U.S.C. Sections 351(a)(2)(B), 352(a), 352(f)(1), 352(o), and 355(a) of the Act.

Issued: 3/16/92

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

File No. DC #98-01650-DAE(RLH)

WESTERN STATES MEDICAL CENTER, A NEVADA CORPORATION; WOMEN'S INTERNATIONAL PHARMACY, A WISCONSIN CORPORATION; HEALTH PHARMACY, A WISCONSIN CORPORATION; APOTHECURE, A TEXAS CORPORATION; COLLEGE PHARMACY, A COLORADO CORPORATION; LAKESIDE PHARMACY, A TENNESSEE CORPORATION; WEDGEWOOD VILLAGE PHARMACY, A NEW JERSEY CORPORATION, PLAINTIFFS-APPELLEES

v.

DONNA E. SHALALA, IN HER OFFICIAL CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; JANE E. HENNEY, M.D., IN HER OFFICIAL CAPACITY AS COMMISSIONER, DEFENDANTS-APPELLANTS

Filed: Apr. 27, 2001

Before: SCHROEDER, Chief Judge, HALL, and W. A. FLETCHER, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX F

STATUTORY PROVISIONS

1. Section 353a of Title 21, United States Code, provides:

Pharmacy compounding

(a) In general

Sections 351(a)(2)(B), 352(f)(1), and 355 of this title shall not apply to a drug product if the drug product is compounded for an identified individual patient based on the unsolicited receipt of a valid prescription order or a notation, approved by the prescribing practitioner, on the prescription order that a compounded product is necessary for the identified patient, if the drug product meets the requirements of this section, and if the compounding—

(1) is by—

(A) a licensed pharmacist in a State licensed pharmacy or a Federal facility, or

(B) a licensed physician,

on the prescription order for such individual patient made by a licensed physician or other licensed practitioner authorized by State law to prescribe drugs; or

(2)(A) is by a licensed pharmacist or licensed physician in limited quantities before the receipt of a valid prescription order for such individual patient; and

(B) is based on a history of the licensed pharmacist or licensed physician receiving valid prescrip-

tion orders for the compounding of the drug product, which orders have been generated solely within an established relationship between—

(I) the licensed pharmacist or licensed physician; and

(ii)(I) such individual patient for whom the prescription order will be provided; or

(II) the physician or other licensed practitioner who will write such prescription order.

(b) Compounded drug

(1) Licensed pharmacist and licensed physician

A drug product may be compounded under subsection (a) of this section if the licensed pharmacist or licensed physician—

(A) compounds the drug product using bulk drug substances, as defined in regulations of the Secretary published at section 207.3(a)(4) of title 21 of the Code of Federal Regulations—

(i) that—

(I) comply with the standards of an applicable United States Pharmacopoeia or National Formulary monograph, if a monograph exists, and the United States Pharmacopoeia chapter on pharmacy compounding;

(II) if such a monograph does not exist, are drug substances that are components of drugs approved by the Secretary; or

(III) if such a monograph does not exist and the drug substance is not a component of a drug

approved by the Secretary, that appear on a list developed by the Secretary through regulations issued by the Secretary under subsection (d) of this section;

(ii) that are manufactured by an establishment that is registered under section 360 of this title (including a foreign establishment that is registered under section 360(i) of this title); and

(iii) that are accompanied by valid certificates of analysis for each bulk drug substance;

(B) compounds the drug product using ingredients (other than bulk drug substances) that comply with the standards of an applicable United States Pharmacopoeia or National Formulary monograph, if a monograph exists, and the United States Pharmacopoeia chapter on pharmacy compounding;

(C) does not compound a drug product that appears on a list published by the Secretary in the Federal Register of drug products that have been withdrawn or removed from the market because such drug products or components of such drug products have been found to be unsafe or not effective; and

(D) does not compound regularly or in inordinate amounts (as defined by the Secretary) any drug products that are essentially copies of a commercially available drug product.

(2) Definition

For purposes of paragraph (1)(D), the term "essentially a copy of a commercially available drug product" does not include a drug product in which there is a change, made for an identified individual patient, which

produces for that patient a significant difference, as determined by the prescribing practitioner, between the compounded drug and the comparable commercially available drug product.

(3) Drug product

A drug product may be compounded under subsection (a) of this section only if—

(A) such drug product is not a drug product identified by the Secretary by regulation as a drug product that presents demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug product; and

(B) such drug product is compounded in a State—

(i) that has entered into a memorandum of understanding with the Secretary which addresses the distribution of inordinate amounts of compounded drug products interstate and provides for appropriate investigation by a State agency of complaints relating to compounded drug products distributed outside such State; or

(ii) that has not entered into the memorandum of understanding described in clause (i) and the licensed pharmacist, licensed pharmacy, or licensed physician distributes (or causes to be distributed) compounded drug products out of the State in which they are compounded in quantities that do not exceed 5 percent of the total prescription orders dispensed or distributed by such pharmacy or physician.

The Secretary shall, in consultation with the National Association of Boards of Pharmacy, develop a standard

memorandum of understanding for use by the States in complying with subparagraph (B)(i).

(c) Advertising and promotion

A drug may be compounded under subsection (a) of this section only if the pharmacy, licensed pharmacist, or licensed physician does not advertise or promote the compounding of any particular drug, class of drug, or type of drug. The pharmacy, licensed pharmacist, or licensed physician may advertise and promote the compounding service provided by the licensed pharmacist or licensed physician.

(d) Regulations

(1) In general

The Secretary shall issue regulations to implement this section. Before issuing regulations to implement subsections (b)(1)(A)(i)(III), (b)(1)(C), or (b)(3)(A) of this section, the Secretary shall convene and consult an advisory committee on compounding unless the Secretary determines that the issuance of such regulations before consultation is necessary to protect the public health. The advisory committee shall include representatives from the National Association of Boards of Pharmacy, the United States Pharmacopoeia, pharmacy, physician, and consumer organizations, and other experts selected by the Secretary.

(2) Limiting compounding

The Secretary, in consultation with the United States Pharmacopoeia Convention, Incorporated, shall promulgate regulations identifying drug substances that may be used in compounding under subsection (b)(1)(A)(i)(III) of this section for which a monograph does not exist or which are not components of drug products

approved by the Secretary. The Secretary shall include in the regulation the criteria for such substances, which shall include historical use, reports in peer reviewed medical literature, or other criteria the Secretary may identify.

(e) Application

This section shall not apply to—

(1) compounded positron emission tomography drugs as defined in section 321(ii) of this title; or

(2) radiopharmaceuticals.

(f) Definition

As used in this section, the term "compounding" does not include mixing, reconstituting, or other such acts that are performed in accordance with directions contained in approved labeling provided by the product's manufacturer and other manufacturer directions consistent with that labeling.

2. Section 321(p) of Title 21, United States Code, provides:

(p) The term "new drug" means-

(1) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new

drug" if at any time prior to June 25, 1938, it was subject to the Food and Drug Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug (except a new animal drug or an animal feed bearing or containing a new animal drug) the composition of which is such that such drug, as a result of investigations to determine its safety and effectiveness for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions.

3. Section 331 of Title 21, United States Code, provides, in relevant part:

Prohibited acts

The following acts and the causing thereof are prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355 of this title.

* * * * *

4. Section 351 of Title 21, United States Code, provides, in relevant part:

(a) Poisonous, insanitary, etc., ingredients; adequate controls in manufacture

(1) If it consists in whole or in part of any filthy, putrid, of decomposed substance; or (2)(A) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or (B) if it is a drug and the methods used in, or the facilities or controls used for, its manufacture, processing, packing, or holding do not conform to or are not operated or administered in conformity with current good manufacturing practice to assure that such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, which it purports or is represented to possess; or (C) if it is a compounded positron emission tomography drug and the methods used in, or the facilities and controls used for, its compounding, processing, packing, or holding do not conform to or are not operated or administered in conformity with the positron emission tomography compounding standards and the official monographs of the United States Pharmacopoeia to assure that such drug meets the requirements of this chapter as to safety and has the identity and strength, and meets the quality and purity characteristics, that it purports or is represented to possess; or (3) if its container is com-

posed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (4) it bears or contains, for purposes of coloring only, a color additive which is unsafe within the meaning of section 379e(a) of this title, or (B) it is a color additive the intended use of which in or on drugs or devices is for purposes of coloring only and is unsafe within the meaning of section 379e(a) of this title; or (5) if it is a new animal drug which is unsafe within the meaning of section 360b of this title; of (6) if it is an animal feed bearing or containing a new animal drug, and such animal feed is unsafe within the meaning of section 360b of this title.

(b) Strength, quality, or purity differing from official compendium

If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium, or such tests or methods of assay as are prescribed are, in the judgment of the Secretary, insufficient for the making such determination, the Secretary shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe tests or methods of assay which, in the judgment of the Secretary, are sufficient for purposes of this paragraph, then the Secretary shall promulgate regulations prescribing appropriate tests or methods of assay in accordance

with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States it shall be subject to the requirements of the United States Pharmacopoeia unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States and not to those of the United States Pharmacopoeia.

(c) Misrepresentation of strength, etc., where drug is unrecognized in compendium

If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(d) Mixture with or substitution of another substance

If it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor.

* * * * *

5. Section 352 of Title 21, United States Code, provides, in relevant part:

Misbranded drugs and devices

A drug or device shall be deemed to be misbranded-

(a) False or misleading label

If its labeling is false or misleading in any particular. Health care economic information provided to a formulary committee, or other similar entity, in the course of the committee or the entity carrying out its responsibilities for the selection of drugs for managed care or other similar organizations, shall not be considered to be false or misleading under this paragraph if the health care economic information directly relates to an indication approved under section 290aa-4 or under section 262(a) of Title 42 for such drug and is based on competent and reliable scientific evidence. The requirements set forth in section 290aa-4(a) or in section 262(a) of Title 42 shall not apply to health care economic information provided to such a committee or entity in accordance with this paragraph. Information that is relevant to the substantiation of the health care economic information presented pursuant to this paragraph shall be made available to the Secretary upon request. In this paragraph, the term "health care economic information" means any analysis that identifies, measures, or compares the economic consequences, including the costs of the represented health outcome of the use of a drug to the use of another drug, to another health care intervention, or to no intervention.

(b) Package form; contents of label

If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of

the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) Prominence of information on label

If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

* * * * *

(e) Designation of drugs or devices by established names

(1)(A) If it is a drug, unless its label bears, to the exclusion of any other nonproprietary name (except the applicable systematic chemical name or the chemical formula)—

(i) the established name (as defined in subparagraph (3)) of the drug, if there is such a name;

(ii) the established name and quantity or, if determined to be appropriate by the Secretary, the proportion of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including whether active or not the established name and quantity or if determined to be appropriate by the Secretary, the proportion of any bromides, ether, chloroform, acetanilide, acetophen-

detidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein, except that the requirement for stating the quantity of the active ingredients, other than the quantity of those specifically named in this subclause, shall not apply to nonprescription drugs not intended for human use; and

(iii) the established name of each inactive ingredient listed in alphabetical order on the outside container of the retail package and, if determined to be appropriate by the Secretary, on the immediate container, as prescribed in regulation promulgated by the Secretary, except that nothing in this subclause shall be deemed to require that any trade secret be divulged, and except that the requirements of this subclause with respect to alphabetical order shall apply only to nonprescription drugs that are not also cosmetics and that this subclause shall not apply to nonprescription drugs not intended for human use.

(B) For any prescription drug the established name of such drug or ingredient, as the case may be, on such label (and on any labeling on which a name for such drug or ingredient is used) shall be printed prominently and in type at lease half as large as that used thereon for any proprietary name or designation for such drug or ingredient, except that to the extent that compliance with the requirements of subclause (ii) or (iii) of clause (A) or this

clause is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

* * * * *

(3) As used in subparagraph (1), the term "established name", with respect to a drug or ingredient thereof, means (A) the applicable official name designated pursuant to section 358 of this title, or (B), if there is no such name and such drug, or such ingredient, is an article recognized in an official compendium, then the official title thereof in such compendium, or (C) if neither clause (A) nor clause (B) of this subparagraph applies, then the common or usual name, if any, of such drug or of such ingredient, except that where clause (B) of this subparagraph applies to an article recognized in the United States Pharmacopoeia and in the Homeopathic Pharmacopoeia under different official titles, the official title used in the United States Pharmacopoeia shall apply unless it is labeled and offered for sale as homeopathic drug, in which case the official title used in the Homeopathic Pharmacopoeia shall apply.

* * * * *

(f) Directions for use and warnings on label

Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users, except that where any requirement of clause (1) of this paragraph, as applied

to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement.

(g) Representations as recognized drug; packing and labeling; inconsistent requirements for designation of drug

If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein. The method of packing may be modified with the consent of the Secretary. Whenever a drug is recognized in both the United States Pharmacopoeia and the Homeopathic Pharmacopoeia of the United States, it shall be subject to the requirements of the United States Pharmacopoeia with respect to packaging and labeling unless it is labeled and offered for sale as a homeopathic drug, in which case it shall be subject to the provisions of the Homeopathic Pharmacopoeia of the United States, and not to those of the United States Pharmacopoeia, except that in the event of inconsistency between the requirements of this paragraph and those of paragraph (e) as to name by which the drug or its ingredients shall be designated, the requirements of paragraph (e) shall prevail.

(h) Deteriorative drugs; packing and labeling

If it has been found by the Secretary to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Secretary shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the

Secretary shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(i) Drug; misleading container; limitation; offer for sale under another name

(1) If it is a drug and its container is so made, formed, or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug.

(j) Health-endangering when used as prescribed

If is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof.

* * * * *

(n) Prescription drug advertisements: established name; quantitative formula; side effects, contraindications, and effectiveness; prior approval; false advertising; labeling; construction of the Convention on Psychotropic Substances

In the case of any prescription drug distributed or offered for sale in any State, unless the manufacturer, packer, or distributor thereof includes in all advertisements and other descriptive printed matter issued or caused to be issued by the manufacturer, packer, or distributor with respect to that drug a true statement of (1) the established name as defined in paragraph (e) of this section, printed prominently and in type at least half as large as that used for any trade or brand name thereof (2) the formula showing quantitatively each ingredient of such drug to the extent required for labels

under paragraph (e) of this section, and (3) such other information in brief summary relating to side effects contraindications, and effectiveness as shall be required in regulations which shall be issued by the Secretary in accordance with the procedure specified in section 371(e) of this title, except that (A) except in extraordinary circumstances, no regulation issued under this subsection shall require prior approval by the Secretary of the content of any advertisement, and (B) no advertisement of a prescription drug, published after the effective date of regulations issued under this subsection applicable to advertisement of prescription drugs, shall with respect to the matters specified in this subsection or covered by such regulations, be subject to the provisions of sections 52 to 57 Title 15. This paragraph (n) shall not be applicable to any printed matter which the Secretary determines to be labeling as defined in section 321(m) of this title. Nothing in the Convention on Psychotropic Substances, signed at Vienna, Austria, on February 21, 1971, shall be construed to prevent drug price communications to consumer.

***(o)* Drugs or devices from nonregistered establishments**

If it was manufactured, prepared, propagated, compounded, or processed in an establishment in any State not duly registered under section 360 of this title, if it was not included in a list required by section 360(j) of this title, if a notice or other information respecting it was not provided as required by such section or section 360(k) of this title, or if it does not bear such symbols from the uniform system for identification of devices prescribed under section 360(e) of this title as the Secretary by regulation requires.

(p) Packaging or labeling of drugs in violation of regulations

If it is a drug and its packaging or labeling is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of Title 15.

* * * * *

6. Section 355 of Title 21, United State Code, provides, in relevant part:

New drugs

(a) Necessity of effective approval of application

No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an approval of an application filed pursuant to subsection (b) or (j) of this section is effective with respect to such drug.

* * * * *

7. Section 360 of Title 21, United States Code, provides, in relevant part:

Registration of producers of drugs or devices

(a) Definitions

As used in this section—

(1) the term "manufacture, preparation, propagation, compounding, or processing" shall include repackaging or otherwise changing the container, wrapper, or labeling of any drug package or device package in furtherance of the distribution of the drug or device from the original place of manufacture to the person who makes final delivery or sale to the ultimate consumer or user; and

(2) the term "name" shall include in the case of a partnership the name of each partner and, in the case of a corporation, the name of each corporate officer and director, and the State of incorporation.

(b) Annual registration

On or before December 31 of each year every person who owns or operates any establishment in any State engaged in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs, or a device or devices shall register with the Secretary his name, places of business, and all such establishments.

(c) New producers

Every person upon first engaging in the manufacture, preparation, propagation, compounding, or processing of a drug or drugs or a device or devices in any establishment which he owns or operates in any State shall immediately register with the Secretary his name, place of business, and such establishment.

(d) Additional establishments

Every person duly registered in accordance with the foregoing subsections of this section shall immediately register with the Secretary any additional establishment which he owns or operates in any State and in which he begins the manufacture, preparation, propagation, compounding, or processing of a drug or drugs or a device or devices.

(e) Registration number; uniform system for identification of devices intended for human use

The Secretary may assign a registration number to any person or any establishment registered in accordance with this section. The Secretary may also

assign a listing number to each drug or class of drugs listed under subsection (j) of this section. Any number assigned pursuant to the preceding sentence shall be the same as that assigned pursuant to the National Drug Code. The Secretary may by regulation prescribe a uniform system for the identification of devices intended for human use and may require that persons who are required to list such devices pursuant to subsection (j) of this section shall list such devices in accordance with such system.

(f) Availability of registrations for inspection

The Secretary shall make available for inspection, to any person so requesting, any registration filed pursuant to this section; except that any list submitted pursuant to paragraph (3) of subsection (j) of this section and the information accompanying any list or notice filed under paragraph (1) or (2) of that subsection shall be exempt from such inspection unless the Secretary finds that such an exemption would be inconsistent with protection of the public health.

(g) Exclusions from application of section

The foregoing subsections of this section shall not apply to—

(1) pharmacies which maintain establishments in conformance with any applicable local laws regulating the practice of pharmacy and medicine and which are regularly engaged in dispensing prescription drugs or devices, upon prescriptions of practitioners licensed to administer such drugs or devices to patients under the care of such practitioners in the course of their professional practice, and which do not manufacture, prepare, propagate, compound, or process drugs or devices for sale other than in

the regular course of their business of dispensing or selling drugs or devices at retail;

(2) practitioners licensed by law to prescribe or administer drugs or devices and who manufacture, prepare, propagate, compound, or process drugs or devices solely for use in the course of their professional practice;

(3) persons who manufacture, prepare, propagate, compound, or process drugs or devices solely for use in research, teaching, or chemical analysis and not for sale;

(4) any distributor who acts as a wholesale distributor of devices, and who does not manufacture, repackage, process, or relabel a device; or

(5) such other classes of persons as the Secretary may by regulation exempt from the application of this section upon a finding that registration by such classes of persons in accordance with this section is not necessary for the protection of the public health.

In this subsection, the term "wholesale distributor" means any person (other than the manufacturer or the initial importer) who distributes a device from the original place of manufacture to the person who makes the final delivery or sale of the device to the ultimate consumer or user.

(h) Inspection of premises

Every establishment in any State registered with the Secretary pursuant to this section shall be subject to inspection pursuant to section 374 of this title and every such establishment engaged in the manufacture, propagation, compounding, or processing of a drug or drugs or of a device or devices classified in class II or III shall be so inspected by one or more officers or employers duly designated by the Secretary at least once in the two-year period beginning with the date of registration of such establishment pursuant to this section and at least once in every successive two-year period thereafter.

* * * * *

(j) Filing of lists of drugs and devices manufactured, prepared, propagated and compounded by registrants; statements; accompanying disclosures

(1) Every person who registers with the Secretary under subsection (b), (c), or (d) of this section shall, at the time of registration under any such subsection, file with the Secretary a list of all drugs and a list of all devices and a brief statement of the basis for believing that each device included in the list is a device rather than a drug (with each drug and device in each list listed by its established name (as defined in section 352(e) of this title) and by any proprietary name) which are being manufactured, prepared, propagated, compounded, or processed by him for commercial distribution and which he has not included in any list of drugs or devices filed by him with the Secretary under this paragraph or paragraph (2) before such time of registration. Such list shall be prepared in such form and manner as the Secretary may prescribe and shall be accompanied by—

(A) in the case of a drug contained in the applicable list and subject to section 355 or 360b of this title, or a device intended for human use contained in the applicable list with respect to which a per-

formance standard has been established under section 360d of this title or which is subject to section 360e of this title, a reference to the authority for the marketing of such drug or device and a copy of all labeling for such drug or device;

(B) in the case of any other drug or device contained in an applicable list—

(i) which drug is subject to section 353(b) of this title, or which device is a restricted device, a copy of all labeling for such drug or device, a representative sampling of advertisements for such drug or device, and, upon request made by the Secretary for good cause, a copy of all advertisements for a particular drug product or device, or

(ii) which drug is not subject to section 353(b)(1) of this title or which device is not a restricted device, the label and package insert for such drug or device and a representative sampling of any other labeling for such drug or device;

(C) in the case of any drug contained in an applicable list which is described in subparagraph (B), a quantitative listing of its active ingredient or ingredients, except that with respect to a particular drug product the Secretary may require the submission of a quantitative listing of all ingredients if he finds that such submission is necessary to carry out the purposes of this chapter; and

(D) if the registrant filing a list has determined that a particular drug product or device contained in such list is not subject to section 355 or 360b of

this title, or the particular device contained in such list is not subject to a performance standard established under section 360d of this title or to section 360e of this title or is not a restricted device a brief statement of the basis upon which the registrant made such determination if the Secretary requests such a statement with respect to that particular drug product or device.

(2) Each person who registers with the Secretary under this section shall report to the Secretary once during the month of June of each year and once during the month of December of each year the following information:

(A) A list of each drug or device introduced by the registrant for commercial distribution which has not been included in any list previously filed by him with the Secretary under this subparagraph or paragraph (1) of this subsection. A list under this subparagraph shall list a drug or device by its established name (as defined in section 352(e) of this title) and by any proprietary name it may have and shall be accompanied by the other information required by paragraph (1).

(B) If since the date the registrant last made a report under this paragraph (or if he has not made a report under this paragraph, since February 1, 1973) he has discontinued the manufacture, preparation, propagation, compounding, or processing for commercial distribution of a drug or device included in a list filed by him under subparagraph (A) or paragraph (1); notice of such discontinuance, the date of such discontinuance, and the identity (by established name (as defined in section 352(e) of this

title) any by any proprietary name) of such drug or device.

(C) If since the date of registrant reported pursuant to subparagraph (B) a notice of discontinuance he has resumed the manufacture, preparation, propagation, compounding, or processing for commercial distribution of the drug or device with respect to which such notice of discontinuance was reported; notice of such resumption, the date of such resumption, the identity of such drug or device (each by established name (as defined in section 3529(e) of this title) and by any proprietary name), and the other information required by paragraph (1), unless the registrant has previously reported such resumption to the Secretary pursuant to this subparagraph.

(D) Any material change in any information previously submitted pursuant to this paragraph or paragraph (1).

(3) The Secretary may also require each registrant under this section to submit a list of each drug product which (A) the registrant is manufacturing, preparing, propagating, compounding, or processing for commercial distribution, and (B) contains a particular ingredient. The Secretary may not require the submission of such a list unless he has made a finding that the submission of such a list is necessary to carry out the purposes of this chapter.

* * * * *

8. Section 374 of Title 21, United States Code, provides, in relevant part:

(a) Right of agents to enter; scope of inspection; notice; promptness; exclusions

(1) For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, upon presenting appropriate credentials and a written notice to the owner, operator, or agent in charge, are authorized (A) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (B) to inspect, at reasonable times and within reasonable limits and in a reasonable manner, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. In the case of any factory, warehouse, establishment, or consulting laboratory in which prescription drugs, nonprescription drugs intended for human use, or restricted devices are manufactured, processed, packed, or held, the inspection shall extend to all things therein (including records, files, papers, processes, controls, and facilities) bearing on whether prescription drugs, nonprescription drugs intended for human use, or restricted devices which are adulterated or misbranded within the meaning of this chapter, or which may not be manufactured, introduced into interstate commerce, or sold, or offered for sale by reason of any provision of this chapter, have been or are being manufactured, processed, packed, transported, or held in any such place, or otherwise bearing on violation of

this chapter. No inspection authorized by the preceding sentence or by paragraph (3) shall extend to financial data, sales data other than shipment data, pricing data, personnel data (other than data as to qualifications of technical and professional personnel performing functions subject to this chapter), and research data (other than data relating to new drugs, antibiotic drugs, and devices and subject to reporting and inspection under regulations lawfully issued pursuant to section 355(i) or (k), section 360i, or 360j(g) of this title, and data relating to other drugs or devices which in the case of a new drug would be subject to reporting on inspection under lawful regulations issued pursuant to section 355(j) of this title). A separate notice shall be given for each such inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness.

(2) The provisions of the second sentence of paragraph (1) shall not apply to—

(A) pharmacies which maintain establishments in conformance with any applicable local laws regulating the practice of pharmacy and medicine and which are regularly the practice engaged in dispensing prescription drugs or devices, upon prescriptions of practitioners licenses to administer such drugs or devices to patients under the care of such practitioners in the course of their professional practice, and which do not, either through a subsidiary or otherwise, manufacture, prepare, propagate, compound, or process drugs or devices for sale other than in the regular course of their business of dispensing or selling drugs or devices at retail;

(B) practitioners licensed by law to prescribe or administer drugs, or prescribe or use devices, as the case may be, and who manufacture, prepare, propagate, compound, or process drugs, or manufacture or process devices, solely for use in the course of their professional practice;

(C) persons who manufacture, prepare, propagate, compound, or process drugs or manufacture or process devices, solely for use in research, teaching, or chemical analysis and not for sale;

(D) such other classes of person as the Secretary may by regulation exempt from the application of this section upon a finding that inspection as applied to such classes of persons in accordance with this section is not necessary for the protection of the public health.

(3) An officer or employee making an inspection under paragraph (1) for purposes of enforcing the requirements of section 350a of this title applicable to infant formulas shall be permitted, at all reasonable times, to have access to and to copy and verify any records—

(A) bearing on whether the infant formula manufactured or held in the facility inspected meets the requirements of section 350a of this title, or

(B) required to be maintained under section 350a of this title.

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